

Initial Review Draft

REGULATORY IMPACT REVIEW

and

INITIAL REGULATORY FLEXIBILITY ANALYSIS

MODIFICATION OF COOPERATIVE, IFQ, AND IPQ APPLICATION DEADLINES

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

February 2011

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 annual individual processing quota (IPQ) with a one-to-one correspondence to a specific portion of the annual individual fishing quota (IFQ) pool – “Class A IFQ”. Use of either these IPQ or “Class A IFQ” requires matching with the other share type, on a pound for pound basis. To ensure applicants have adequate due process opportunity to contest any finding concerning qualification for an allocation, at the time of annual issuance of IFQ and IPQ, NOAA Fisheries sets aside quota (either IFQ or IPQ, as the case may be) in an amount needed to cover any possible claim of an applicant, should the final determination favor the applicant. As a result, any application disputes not finalized at the time of the allocation of IFQ and IPQ have the potential to strand quota of the other share type, in the event the applicant does not appeal or does not prevail on appeal (since the withheld quota cannot reasonably be issued to other qualified applicants). Moving the application deadline from August 1st to June 15th may allow additional time to finalize some appeal filings and proceedings, thereby reducing the potential for quota stranding.

Purpose and Need Statement

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

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 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.

Alternatives

The status quo filing deadline for annual cooperative, IFQ and IPQ applications is August 1st. A single action alternative, which would move the deadline for these annual applications to June 15th, is being considered. In addition, an option would allow only 30 days to appeal an initial administrative determination to withhold quota.¹

Effects of the alternatives

Under the status quo, the cooperative, IFQ, and IPQ application deadlines will remain August 1st. This deadline leaves little time for administrators to resolve any disputes concerning qualification of QS holders or PQS holders for IFQ and IPQ, respectively. Since administrators are compelled to reserve IFQ and IPQ sufficient to satisfy any disputes, unallocated shares in either sector can strand not only the unissued shares, but also a matching amount of shares from the opposing sector. For example, unissued Class A IFQ will result in an equivalent amount of issued IPQ being unusable. Under the status quo, persons have 60 days to appeal any decision of the agency to withhold IFQ or IPQ. This time period (although standard for most administrative appeals) also contributes to the stranding of quota, as it extends until early October, when IFQ and IPQ are issued in most fisheries.

¹ It should be noted that transfers of QS and PQS are not permitted from the application deadline until the issuance of IFQ and IPQ. This halt on transfers is needed, in part, to ensure that issuances are made in accordance with rules against the issuance of Class B IFQ to persons who have affiliations to IPQ holders.

Under the action alternative, the deadline for cooperative, IFQ, and IPQ applications would be moved to June 15th. This deadline allows substantially more time for resolution of administrative findings that might deny allocations of IFQ or IPQ. Finalization of those decisions will aid in reducing the amount of stranded quota arising from set asides to ensure quota are available to satisfy possible claims. An ancillary benefit of the earlier deadline is that the June 15th deadline falls during a period that is less busy for participants in the fishery, as a portion of the harvester sector also participates in summer salmon fisheries. Under an option, the time to appeal decisions to withhold IFQ and IPQ allocations would be reduced to 30 days (from 60 days). This reduction in time to appeal will obviously allow less time for a person to initiate an appeal of an administrative decision, but is not believed to be unfairly constraining, especially in light of the efforts of administrators to ensure that participants receive notice of application deadlines and typically attempt to locate persons failing to apply to ensure that failure is intentional. The shorter appeal period is intended to reduce the portions of the IFQ and IPQ pools that must be reserved by ensuring that administrators know which QS and PQS holders are disputing a denial and, possibly, allowing for the resolution of some appeals before or early in the season.

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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 “program”). The program is unique in several ways, including the allocation of annual individual processing quota (IPQ) with a one-to-one correspondence to a specific portion of the annual individual fishing quota (IFQ) pool – “Class A IFQ”. Use of either these IPQ or “Class A IFQ” requires matching with the other share type, on a pound for pound basis. To ensure applicants have adequate due process opportunity to contest any finding concerning qualification for an allocation, at the time of annual issuance of IFQ and IPQ, NOAA Fisheries sets aside quota (either IFQ or IPQ, as the case may be) in an amount needed to cover any possible claim of an applicant, should the final determination favor the applicant. As a result, any application disputes not finalized at the time of the allocation of IFQ and IPQ have the potential to strand quota of the other share type, in the event the applicant does not appeal, or does not prevail in the action (since the withheld quota cannot reasonably be issued to other qualified applicants. Moving the application deadline from August 1st to June 15th may allow additional time to finalize some appeal filings and proceedings, thereby reducing the potential for quota stranding.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of the alternatives to modify the application deadline for IFQ, IPQ, and cooperatives under the program. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.²

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 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

² 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 timing of application deadlines for cooperatives and annual allocations of IFQ and IPQ and dates during which transfers would be allowed. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

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:

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 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.

2.2 Description of Alternatives

The Council has identified a single action alternative that would move the application deadline from the current date of August 1st to June 15th.

The specific alternatives identified by the Council are:

Alternative 1: Status quo.

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

Alternative 2: adopt earlier application deadline.

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

2.2.1 Alternatives considered, but not advanced for analysis

The Council considered alternatives that would specify an earlier or later application deadline. Earlier deadlines were dismissed from consideration, as those deadlines would extend into the preceding crab fishing season and may complicate the completion of record keeping by participants from that preceding season. Later deadlines would fall within other activities of fishery participants (including salmon processing and tendering) conflicting with those activities. The analyzed deadline (June 15th) is conveniently timed between the end of the crab season and other activities.

2.3 Existing Conditions

This section describes the relevant existing conditions in the crab fisheries. The section begins with a brief description of the pertinent aspects of the management of the fisheries under the rationalization program, followed by brief descriptions of the harvesting and processing sectors in the fisheries.

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 *Chionocetes. 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 comprise 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 history as a State of Alaska permit holder who signed fish tickets for qualifying historic crab deliveries. QS annually yields individual fishing quota (IFQ), which represent privileges to harvest a specific amount of crab IFQ (in pounds) in a given crab fishing year (based on the total allowable catch of the program). The size of each annual IFQ allocation is based on the amount of QS held in relation to the QS pool in the fishery (with C share IFQ issued for 3 percent of the total annual IFQ allocation). So, a person holding 1 percent of the owner QS pool would receive IFQ to harvest 0.97 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).³ The remaining 10 percent of these annual IFQs are issued as "B shares", or "Class B IFQ," which may be delivered to any processor.⁴ 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.⁵

2.3.2 The cooperative, IFQ, and IPQ application process

Annually, QS holders are required to apply for IFQ, either through an individual application if not joining a cooperative, or on an application submitted by the cooperative manager as part of a cooperative application; applications are due at NOAA Fisheries Restricted Access Management Program (RAM) on or before August 1st. Individual QS holders may elect to have their IFQ assigned to a cooperative with

³ C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ and regional landing requirements.

⁴ The terms "A share" and "Class A IFQ" are used interchangeably in this paper, as are the terms "B share" and "Class B IFQ".

⁵ 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 as A shares).

elections on the application form. PQS holders, similarly, must file applications annually by August 1 to receive IPQ. Since IPQ are not subject to cooperative management, these applications are filed by the PQS holder, with IPQ issued directly to the PQS holder. To aid QS holders and PQS holders in avoiding untimely applications, NOAA Fisheries maintains applications on its website, highlights the deadline on that site, and sends reminders to QS holders and PQS holders near the end of the crab fishing year for the next year.

In all fisheries (except the Aleutian Islands golden king crab fisheries), cooperative, IFQ, and IPQ applications are processed by RAM, with IFQ and IPQ typically issued within 10 days after the announcements of total allowable catches in the fisheries. In the August in the two Aleutian Island golden king crab fisheries, IFQ and IPQ are typically issued in the first week of August (or within 10 days of the August 1st application deadline). RAM uses the period between the application due date and IFQ and IPQ issuances for several purposes. Applications are reviewed to ensure information is correctly recorded and QS holder filings are consistent with the applications of cooperatives to which they belong. Ownership and affiliation information that is part of or accompanying applications is reviewed to verify cap compliance and to determine the qualification of applicants to receive Class B IFQ (as QS holders with affiliations with PQS holders are issued Class A IFQ up to the amount of IPQ issued to its affiliates). Reconciliation of these affiliations is necessary to ensure Class A IFQ and Class B IFQ allocations are correctly apportioned for each recipient, as correction of a Class A IFQ issuance may require reissuance of all IFQ to adjust the proportion of Class A IFQ to Class B IFQ for each recipient. The spillover effects of a reissuance are not inconsequential, as holders of Class A IFQ and IPQ holders typically match shares immediately after the issuance to establish delivery relationships for the impending season. Reissuance requires these parties to rematch shares, with contracting costs, and possible changes in these relationships depending on choices of IFQ and IPQ holders the extent of changes in the IFQ and IPQ holdings arising from the redistribution. To ensure correct issuance of IFQ and IPQ (including the prescribed distribution of Class B IFQ derived from PQS holder affiliations) transfers of QS and PQS are prohibited from the time of application for IFQ and IPQ until issuance of those IFQ and IPQ.

Although IFQ and IPQ issuances are formulaic, finalization of issuances is complicated by several factors. Ownership information (used to determine processor affiliations and the resulting distributions of Class A IFQ and Class B IFQ) is required to be updated annually. Cooperative applications require submissions of both the cooperative itself, as well as authorizations from all member QS holders and participating vessel owners. Together, the applications for the large fisheries contain submissions from behalf of almost 525 QS holders, PQS holders, and cooperatives in the largest fisheries. Although each cooperative may consolidate its members' filings into a single submission for the cooperative, in many cases, QS holders submit their portion of a cooperative application separately. In addition, to date, a large share of submissions (on the order of one-third of all submissions) are received within just a few days of the filing deadline. RAM processes submissions on receipt. It is common for RAM to receive duplicate or triplicate submissions which may contain discrepancies that must be reconciled with the filers. Applications must then be compared to QS and PQS holder files to identify persons who have failed to file by the application deadline. Generally, between 30 and 40 persons fail to file each year, or file late. These persons are sent an Initial Administrative Determination (IAD) notifying them of their failure to file timely and informing that they will not receive an annual allocation of IFQ or IPQ, as the case may be. Persons receiving a notice that an annual allocation will be withheld for untimely annual applications are provided with an opportunity to challenge that IAD by notifying the agency of its intent to appeal the finding within 60 days of receiving notice of the finding.

Table 1. QS holders, PQS holders, and cooperatives by fishery (2010-2011).

Fishery	QS holders	PQS holders	Cooperatives in the 2010-2011 season
Bristol Bay red king crab	389	16	9
Bering Sea <i>C. opilio</i>	370	19	9
Eastern Aleutian Island golden king crab	28	10	5
Eastern Bering Sea <i>C. bairdi</i>	382	21	closed
Pribilof red and blue king crab	152	13	closed
St. Matthew Island blue king crab	213	10	9
Western Aleutian Island golden king crab	23	10	4
Western Aleutian Island red king crab	37	8	closed
Western Bering Sea <i>C. bairdi</i>	383	21	closed

Source: RAM dataset (2010-2011).

Due process rights are guaranteed for quota holders by the Administrative Procedures Act. To ensure that the rights of a party to an annual allocation are not lost should that party prevail on an appeal of the initial administrative determination of failure to apply timely, IFQ or IPQ (as the case may be) must be available in an amount needed to provide the allocation until NMFS reaches a Final Agency Action (FAA) on the application. If IFQ and IPQ are not issued before FAA is reached, no complication arises, as no quota must be withheld; however, if IFQ and IPQ are issued prior to FAA, IFQ and IPQ will be set aside in an amount needed to make any allocation distribution that may later be required. Given the scale of the fishery and the complications associated with inseason redistributions (which may take place after share transfers) these IFQ and IPQ will not be redistributed, if the determination to withhold the allocation is affirmed. If withheld quota is either Class A IFQ or IPQ, a mismatch in those pools will result, with a portion of the corresponding pool stranded. For example, if 100 pounds of Class A IFQ are not issued, 100 pounds of issued IPQ will be available for use, but cannot be used because of the withheld IFQ.

Knowing that unissued quota causes these logistically difficult and costly mismatches, RAM has exerted great efforts to aid and encourage timely submission. Application forms are always available on the internet, the deadline is highlighted on the NMFS web site, RAM direct-mails reminder letters with forms to all quota holders 1-2 months prior to the deadline, and processes applications as they arrive, immediately resolving discrepancies among multiple submissions. Unfortunately, due to the volume of applications that arrive close to the deadline, RAM often does not know which applications are late until after that deadline. In rare cases, QS holders and PQS holders notify RAM that they intentionally failed to apply and would not like to receive an allocation, in which case no set aside is required. In others, the QS holder (or PQS holder) has a 60-day period from the IAD of failure to apply timely during which to file an appeal of that finding. With these notices delivered no earlier than August 5th (or 5 days after the application due date), virtually no opportunity exists to avoid a set aside, for a share holder in the Aleutian Island golden king crab fisheries (for which IFQ and IPQ are issued in early August). The time to appeal typically extends until shortly after the date on which IFQ and IPQ are issued in the other fisheries. Even if prioritized, appeals typically take several weeks (or more frequently a period of months) to schedule and process, as written and in person oral testimony are typically presented. Consequently, unless a QS holder (or PQS holder) chooses not to contest RAM's initial administrative determination, IFQ (or IPQ) is likely to be withheld to satisfy due process requirements and cover any finding in favor of the share holder. Depending on timing, a successful appeal may result in IFQ/IPQ issuance late into, or after the

effective crab fishing season for that fishery. In the Bristol Bay red king crab fishery, in particular, an appeal for a large portion of quota that extends into December has the potential to strand IFQ and IPQ, as much of the IFQ in that fishery is harvested by mid-November (NPFMC, 2010) and the season closes on January 15th.

Most quota holders denied annual allocations by RAM for failure to apply timely fail to appeal, or in some cases appeal but do not prevail. Only twice in the first six years of the program have holders of substantial amounts of QS or PQS appealed initial administrative determinations denying allocations of IFQ and IPQ. Both share holders prevailed on appealing the initial findings. NOAA Fisheries satisfied their claims to allocations of IFQ and IPQ from set asides of quota made to cover the potential success of the claimant in the appeal. However, regardless of the outcome, due to the length and rigor of the appeal process, it is almost impossible for NOAA Fisheries to reach Final Agency Action prior RAM's need to compute IFQ and IPQ and distribute those allocations. As a result, even when appellants prevail, allocations rarely can be made before the fishing seasons opens and after the IFQ/IPQ matching have occurred.

2.4 Analysis of alternatives

This section compares and contrasts the effects of the existing deadline with a modified deadline for filing cooperative, IFQ and IPQ allocations and filing appeals of administrative determinations.

2.4.1 Status quo alternative (August 1st application deadlines and 60-day appeal period)

Under the status quo alternative, the filing deadline for cooperative, IFQ, and, IPQ applications would remain August 1st. In addition, a 60-day window would be maintained for filing of an appeal of an initial administrative decision to deny a person an annual allocation of IFQ or IPQ.

Retaining the existing schedule for filing applications will maintain the existing time pressures on NOAA Fisheries to quickly process cooperative, IFQ, and IPQ applications to avoid the potential stranding of quota that arises from non-final administrative determinations. Initial administrative findings will be delivered to persons who are denied their annual allocations, and NOAA Fisheries will continue to solicit statements of QS holders and PQS holders who do not intend to contest findings. If these QS holders and PQS holders do not intend to contest a denial, then no IFQ or IPQ must be set aside to satisfy a possible future finding in their favor. Despite these efforts, it is possible that in some instances, IFQ and IPQ will be required to be reserved to ensure shares are available to cover possible successes of QS holders and PQS holders on administrative appeals. IFQ and IPQ set asides are likely unavoidable in instances of initial findings to withhold allocations in the Aleutian Island golden king crab fisheries, as those fisheries open only two weeks after the application deadline. In other fisheries, set asides may be avoided in some cases, as initial administrative findings that are not contested can occasionally be final prior to IFQ and IPQ issuance. If an appeal is denied, the shares will certainly be stranded, along with any matching Class A IFQ or IPQ from the opposite sector. Even allocations made after a successful appeal could result in stranding (along with any matching Class A IFQ or IPQ) if the appeal is decided late in the season. The risk of stranded allocated quota is greatest in the Bristol Bay red king crab fishery, as that fishery closes is prosecuted largely in November and closes on the 15th of January, months earlier than the other fisheries.

The QS and PQS holders have the greatest ability to prevent the stranding of IFQ and IPQ. It is these parties that can create their own reminders to apply timely, make an application, submit it to cooperative managers, and if needed, follow up the application with NOAA Fisheries to confirm receipt of a complete application and arrange to supplement the application, if needed. Although NOAA Fisheries may be unable to confirm receipt of applications received in the last day or two of the application period,

applications that are filed well in advance of the deadline will be recorded in time for agency staff to be able to provide confirmation. Internal organization and coordination within the harvest sector and between the harvesting and processing sectors can also limit the extent of stranded quota under the status quo alternative. Cooperative managers can work with members to ensure that all filings are made through the cooperative as a single application. This will allow the manager to confirm that the entire application (including member QS holders' submissions) is complete. Applications can be submitted to NOAA Fisheries by quota holders and cooperatives well in advance of the deadline and by a method that ensures proof and date of delivery. This measure would avoid substantial NOAA staff time spent in having to acknowledge each submission rather than processing timely submissions, and would serve as proof of timely submission should a case require an appeal. In addition, cooperative managers, QS holders, and PQS holders who have created relationships with members of the other sector to match shares, can also remind intended partners of the deadline and confirm with those other sectors (but not with NOAA Fisheries) that their applications have been completed and are processed by the agency. This self policing by the industry is likely to be the most effective means of preventing stranded IFQ and IPQ arising from administrative determinations that are not final.

Given the ability of industry to oversee the completion of the application process, it is likely that few IFQ and IPQ need be stranded because of incomplete applications even under the existing deadlines. In addition, since both members of both sectors have been affected by the recent disputed applications (both directly through the applicant and through the potential lost ability to match shares), participants are largely aware of the deadlines and the ramifications of failing to submit a timely, complete application. These factors limit the potential for stranded quota under the status quo.

The current August 1st deadline is also said by some industry members to be somewhat problematic. Some participants in the fishery have suggested that the August 1st deadline overlaps with other activities of industry members, including operations in other fisheries (particularly harvesting, processing, and tendering operations in the salmon fisheries). In addition, RAM is particularly busy at the time of the August 1st deadline (other concurrent obligations include the crab fee review and projections and computations for the new seasons, subsistence applications and renewals, halibut and sablefish quota transfers, as well as other routine business).

A second factor that affects the potential for IFQ or IPQ to be stranded under the status quo is the 60-day period allowed for appealing an initial administrative determination. Given the limited time between the current August 1st application deadline and the IFQ and IPQ issuance in late September or early October, the 60-day appeal period typically extends beyond the IFQ and IPQ issuance. Consequently, even if NOAA Fisheries quickly processes applications and informs QS holders and PQS holders of an initial finding to deny an allocation of IFQ or IPQ, any appeal typically cannot be completed until well into the season. As a result, only in cases when the applicant informs NOAA Fisheries of its intent to not appeal the finding prior to the appeal deadline are all IFQ and IPQ be issued (with no withholding). Despite these timeline for applications and filing appeals, the ability of QS holders and PQS holders to monitor applications both with other industry members and with NOAA Fisheries, the potential for substantive amounts of IFQ and IPQ to be set aside (and potentially stranded) is minimal.

2.4.2 Action alternative (June 15th application deadline)

Under the action alternative, the application deadline would be moved to June 15th from August 1st. The earlier deadline would allow increase the amount of time between the application deadline (and consequently, the deadline for filing appeals) and the issuance of IFQ and IPQ.

The June 15th deadline occurs approximately 100 days from notice of an initial administrative determination and the typical IFQ and IPQ issuance in most fisheries. The additional 45 days (from the

current timeline) allows RAM to notify QS holders and PQS holders of an initial administrative determination prior to the end of June. Based on the existing 60-day period to appeal, the deadline for most appeals would likely occur prior to September 1st, or approximately 25 days prior to the allocation of IFQ and IPQ. Consequently, it is likely that the only instance in which quota would need to be withheld is if a QS holder (or PQS holder) chose to appeal the initial finding.

An earlier application deadline also allows NOAA Fisheries additional time before IFQ and IPQ issuance to inform QS holders and PQS holders of an initial determination to withhold allocations and solicit responses from those QS and PQS holders concerning whether they intend to appeal the initial finding. This may reduce the number of appeals, by ensuring that the only decisions that are not final at the time of IFQ and IPQ issuance are those which have been affirmatively appealed by a QS holder or PQS holder. In comparison to the status quo, this alternative should reduce the potential that IFQ and IPQ are set aside pending an appeal of an initial determination to withhold those IFQ and IPQ. The result will be a reduced potential for mismatches of Class A IFQ and IPQ that arise from withheld Class A IFQ and IPQ pending outcomes of appeals.

Although modification of the application deadline could provide additional time to avoid mismatches of the Class A IFQ and IPQ pools that arise from withheld quota, avoiding withheld quota remains largely in control of applicants, who have the opportunity to file timely under any deadline and confirm the receipt of their applications prior to the deadline to allow time to supplement the application or to address any shortcomings. So, even though this alternative has the potential to reduce the amount of stranded IFQ and IPQ resulting from withheld allocations, the completion of applications in a timely manner to avoid withheld IFQ and IPQ remains in control of QS holders and PQS holders and their cooperative managers.

The earlier deadline would impose some restrictions on QS and PQS holders, as the transfers of shares is suspended from the filing of an IFQ or IPQ application until those shares are issued. Moving the deadline to June 15th would create a period of approximately three and one-half months during which no transfers would be permitted. The limitation should have a minimal effect on participants, since seasons are not open during this period. Parties wishing to enter transactions can agree to future transfers that are implemented once IFQ and IPQ are issued, and the suspension on transfers is lifted. Consequently, this limitation is unlikely to present more than a minor inconvenience to participants.

Administrative and manage burdens associated with this alternative are slightly less than under the status quo. By changing the application deadline to a less busy period, NOAA Fisheries staff should have a slight reduction in administrative burdens associated with application processing. In addition, to the extent that IFQ and IPQ do not need to be reserved, the burden associated with establishing those set asides should be reduced. The overall administrative effects, however, are expected to be very minor.

Option: Reduce time for filing an appeal to 30 days

Under an option, the time for filing an appeal of the denial of an application for IFQ or IPQ could be reduced to 30 days from notice of the initial administrative determination (from the current 60 day time period to file). This reduction in time to appeal should further reduce the potential for IFQ and IPQ to be stranded by allowing ample time between the deadline for appealing actions and the issuance of IFQ and IPQ. The reduced time for appeal (together with the June 15th filing deadline) would result in a deadline for filing appeals prior to August 1st (assuming that applications are processed shortly after the due date, which is currently the case).

Two additional benefits may flow from incorporating this option. First, the shorter time to appeal, together with the earlier application deadline, may allow for the finalization of undisputed decisions to withhold IFQ and IPQ in all fisheries (including the golden king crab fisheries) prior to the issuance of

IFQ and IPQ. Allocations of IFQ and IPQ in the golden king crab fisheries are typically made in the first two weeks of August, as the fishery opens August 15th. With a deadline for filing appeals near August 1st, it may be possible to finalize undisputed administrative decisions to withhold allocations. It is very likely that any disputed applications would extend into the season. In the other fisheries, which open in October, the shorter appeal period will have less effect in this respect, but should reduce time constraints particularly, in conjunction with the earlier application deadline.

A second benefit is that it is possible that some appeals would be adjudicated prior to, or earlier in, the season, allowing prevailing QS holders and PQS holders additional time to use their IFQ and IPQ, respectively. So, even if IFQ or IPQ are withheld, fishery participants would have an improved chance of using any quota issued on appeal, as the allocation may happen earlier in the season than under the current application filing deadline and appeal filing deadline.

Under the revised filing deadline and reduced time for filing an appeal (of the action alternative and option), the potential for stranded IFQ and IPQ are reduced in comparison to the status quo, any quota holders who do not intend to apply or appeal, but also possibly for some who do. The additional time to finalize determinations prior to the season (particularly in the Aleutian Islands golden king crab fisheries) creates this effect. Notwithstanding the improved circumstances under this alternative and option, the potential for reducing stranded IFQ and IPQ because of application filing problems are largely in control of QS holders, PQS holders, and cooperative managers. Under either alternative, these persons have the ability to assist each other to file with ample time prior to the deadline, allowing them to verify that applications are received and complete and to address any residual issues or questions with NOAA Fisheries.

2.4.3 Net benefits to the Nation

This action will likely provide a minor net benefit to the Nation by allowing for the use of additional IFQ and IPQ, in the event that undisputed denials of IFQ and IPQ are finalized prior to share issuances. Although important to share holders involved, these effects are expected to be minimal.

3 REGULATORY FLEXIBILITY ANALYSIS

3.1 Introduction

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:

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 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.

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 allow for resolution of more applications for IFQ and IPQ, to limit the potential for quota of either type to be stranded. 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 QS and PQS and cooperatives formed under the crab rationalization program.

ADD QS numbers here

Estimates of small entities holding PQS are based on the number of employees of PQS holding entities. Currently, 21 entities hold PQS. 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.

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 unchanged by the proposed action. Under the action alternative, only the deadline for filing IFQ, IPQ, and cooperative applications will change. This change does not change the contents of the application, only the timing. Shortening the time allowed for appealing a denial of IFQ or IPQ to 30 days also has no effect on the reporting burden. This later change should not have a substantial effect, as persons wishing to appeal a finding need only provide notice of the intent to challenge the finding. Given that minimal requirement, a 30 day window for filing this appeal should not impose an undue hardship.

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

Although no additional alternatives were analyzed as a part of this analysis, the Council did consider whether earlier or later application deadlines would be workable. The June 15th deadline was identified as the most practical date, as it is late so as to avoid any conflict with the previous season's fisheries, which close, at the latest in June. Later dates than the proposed June 15th deadline are likely to provide limited benefit over the current August 1st deadline in finalizing IFQ and IPQ administrative determinations denying those allocations prior to the issuance of IFQ and IPQ. As a result, dates later than the proposed June 15th deadline are unlikely to provide a benefit of avoiding stranded IFQ and IPQ that arise from non-final administrative denials of those allocations. The effects of these stranded IFQ and IPQ may be more likely to fall on small entities that have less power to gain matching commitments from the other sector for their use of their Class A IFQ and IPQ that are required for the use of those shares. Similarly, the shortened 30 day period for appealing initial administrative determinations to withhold IFQ or IPQ is likely to have little effect on small entities decision of whether to appeal a denial, as the filing of an appeal is a relatively straightforward process under which the appellant must only indicate the intent to appeal the finding. Small entities may be the beneficiaries of reduced stranded IFQ and IPQ that could be avoided through finalizing administrative findings.

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.

The action may help achieve optimum yield by reducing the potential for stranded IFQ, while maintaining the management program's incentives to prevent overfishing.

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 annual harvesting and processing allocations are not stranded, but are available for use. This action will have no effect on the achievement of conservation objectives or excessive shares.

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 by reducing the potential for IFQ and IPQ to be stranded and unusable.

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 associated with unusable annual allocations of IFQ and IPQ.

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 associated with stranded IFQ and IPQ, which may, in turn benefit, communities dependent on the fisheries.

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

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/AECOM (November 2010) Five-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.

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