

Public Review Draft

REGULATORY IMPACT REVIEW

and

INITIAL REGULATORY FLEXIBILITY ANALYSIS

OF A PROVISION DEFINING COOLING OFF AND RIGHT OF FIRST REFUSAL PROTECTIONS FOR THE COMMUNITY OF SAINT GEORGE

For a proposed Regulatory Amendment to
Implement Amendment 32 to the Fishery Management Plan for
Bering Sea and Aleutian Islands King and Tanner Crabs

April 2008

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 “rationalization program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. Processor shares were allocated to processors based on their respective processing histories. To protect community interests, most processing shares were required to be used in the community in which the processing history occurred during the first two years of the program (the ‘cooling off period’). In addition, 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. The agreements also specify that under certain conditions, the right of first refusal will lapse. Due in part to intervening circumstances, and notwithstanding these protections, no shares designated for processing in the City of St. George were processed in that community during the first two years of the rationalization program. This action considers extending the ‘cooling off period’ for the City of St. George and revising the conditions under which the right of first refusal will lapse with respect to those shares.

Purpose and Need Statement

The intent of community protection measures in the crab rationalization program may not have been met in St. George due to unavoidable circumstances including a federal declared disaster. While processing history was generated from St. George, no crab has been processed in St. George under the crab rationalization program. As a result, the two year “cooling off” period will expire June 30, 2007 and the three year right of first refusal (ROFR) will expire June 30, 2008, if IPQ designated for St. George is not used in the community in the 2007/2008 season.

In order to fulfill the original intent of the community protection measures, the Council will initiate an analysis for an FMP amendment to the community protection provisions. The amendment will restart and/or extend the time period for community protection measures (ROFR and “cooling off” period) for St. George. NMFS has indicated that such an amendment will likely not be in place for the 2007/2008 season. However, the intent of the community protection measures may be met by extending the measures into the future.

Alternatives

Alternative 1: Status quo

Alternatives 2 A processor that holds St. George IPQ is subject to a two year cooling off period and a new right of first refusal three year agreement with a starting date of October 1, 2009 – unless that processor and the community entity provide proof to NMFS that they have otherwise entered into a written contract that addresses both the cooling off period and the right of first refusal.

Alternative 3: A processor that holds St. George IPQ is subject to a one year cooling off period and a new right of first refusal three year agreement with a starting date of October 1, 2009 – unless that processor and the community entity provide proof to NMFS that they have otherwise entered into a written contract that addresses both the cooling off period and the right of first refusal.

Effects of the alternatives

Alternative 1: Status quo

Under the status quo, the cooling off provision expired at the end of the 2006-2007 season, allowing IPQ holders to move their shares out of the community of origin. Although the ‘cooling off’ protection lapsed, the protection of the rights of first refusal remains in effect during the term of that contract. Yet, the protection lapses, if the PQS holder uses its IPQ outside the community of origin for a period of 3 consecutive years. Given that no processing has occurred in St. George during the first two years of the program, if PQS holders choose to move their IPQ processing out of that community for the third year of the program, all rights of first refusal to Aleutian Pribilof Island Community Development Association

would lapse under the terms provided for in regulation. On the lapsing of those interests, no regulatory or contractual connection between any PQS and the community of St. George would exist.

Although the rights of first refusal would lapse under the terms required by the crab program, Aleutian Pribilof Island Community Development Association has reached agreement with one PQS holder, who holds approximately 4 percent of the Bering Sea *C. opilio* PQS, concerning the use and transfer of their PQS. Since the terms of that agreement subject to a confidentiality agreement between the parties, it is not known whether processing will be required to occur in St. George or some other benefits will be conveyed to the community in lieu of movement of processing activity to the community. Likewise, the agreement may also include some rights of first refusal on transfers of PQS and IPQ. Aleutian Pribilof Island Community Development Association has not reached agreement with the second PQS holder, who holds slightly less than 6 percent of the Bering Sea *C. opilio* PQS, concerning its shares. Shares held by that PQS holder are subject to the right of first refusal required by the rationalization program, which would lapse, if those PQS are used outside of St. George for three consecutive years. Given that no processing occurred in St. George in the first two years of the program, it is possible that the right could lapse this year, if the shares are processed outside of the community this year.

Under the status quo, PQS holders subject to a St. George association are likely to have the ability to realize any processing efficiencies that might be available by processing their shares in the North region outside of St. George. Efficiencies may be realized by saving any added costs of movement of a floating processor and crews to St. George and any associated permitting with operating in St. George. The effects of the action on harvesters are likely to be limited. Concentration of processing that could occur under the status quo could result in slight operating costs savings to harvesters who might otherwise have needed to make partial deliveries to multiple locations in the North (e.g., St. George and St. Paul). These additional costs are likely to vary depending on share matching and coordination of harvest and are likely to be less prevalent in years of high TACs, when more crab are required to be delivered into St. George (limiting the number of partial deliveries).

Under the status quo, the cooling off period would not be extending, limiting the burden on managers to monitor compliance with that provision. Removal of this burden with respect to St. George associated shares has a very minor effect on management costs. Similarly, the choice not to extend the time period for the removal of rights of first refusal through use of the shares outside the community could reduce management costs very slightly.

Alternatives 2 and 3: Extension of community protection provisions.

Under the second and third alternative, the cooling off period would be renewed and the time period for rights of first refusal to lapse would be renewed. The two alternatives vary only in the length of the new cooling off period. Alternative 2 would create a new cooling off period of two years, while alternative 3 would create a one year period. In all cases, if a PQS holder reaches an agreement with the holder of the rights of first refusal concerning the cooling off period and the rights of first refusal, that agreement would substitute for the new cooling off period and the right of first refusal extension.

The new cooling off period would ensure that processing occurs in the St. George for the period of the extension. Processing in St. George under the cooling off provision would be slightly less than 10 percent of all IPQ in the Bering Sea *C. opilio* fishery, or approximately 4.4 million pounds under the current TAC. Tax revenues would be gained by the community under both the local fish tax and shared state fish tax, as are gained for any processing within community boundaries. Other economic impacts on St. George are likely, but will be limited since the processing is very likely to occur on a floating processor. Floating processors are largely self-supporting, relying primarily on provisions carried to the processing location on the vessel, particularly for short term processing ventures like that which would be undertaken in St. George.

The effects of these alternatives could be increased, if St. George were able to attract additional processing, which might occur given that the cooling off provision would not apply in St. Paul. To the extent that costs might be saved by using a floating processor in St. George only, a potential efficiency could exist for relocating processing to St. George from St. Paul during the new cooling off period. To the extent that processing moves out of St. Paul (either through the direct requirement of the new cooling off period or through the attraction of additional processing beyond the cooling off requirement), St. Paul would suffer a loss of benefits. These losses to St. Paul would likely include taxes revenues and community economic impacts, arising from the processing in St. Paul. If the provision results in the transfer of processing from the shore plant in St. Paul to a floating processor off St. George, it is possible that the result could be a minor loss of economic impacts to communities in the North region. In considering the importance of any potential loss of local impacts, the effects of those impacts should be balanced against the distributional considerations. Given that St. Paul currently attracts a substantially greater share of crab processing in the North region, it is possible that the minor loss of local impacts in the North are outweighed by the need ensure that the smaller economy of St. George benefits from the transfer of economic impacts of the processing activity of the extended cooling off period.

Once the new cooling off period expires, it is uncertain whether St. George would continue to attract processing. The potential to attract processing would largely depend on whether processors perceive an opportunity to improve operations in St. George. These processor benefits could arise, if St. George is perceived to provide improved services, which is uncertain. Alternatively, if the holder of the right of first refusal is able to leverage its improved position, derived from the new cooling off period to gain concessions from the affected PQS holders, it is possible that arrangements could be made for extending processing in the community after that cooling off period lapses. The added leverage of the right holder and its potential to succeed in any such efforts is uncertain and depends on several factors, including the relative financial position of the PQS holders and the right holder. The settlement of terms between the right holder and one of the PQS holders suggests that the potential for the right holder to use this leverage is not wholly hypothetical.

Net benefits to the Nation

A minor decline in net benefits to the Nation is likely to arise from this action. The action is likely to decrease production efficiency for some processors, reducing efficiency that might arise from locating processing outside of St. George.

Table of Contents

1	INTRODUCTION.....	1
2	REGULATORY IMPACT REVIEW	1
2.1	Purpose and Need Statement	2
2.2	Description of Alternatives.....	2
2.3	Existing Conditions	3
2.3.1	Management of the fisheries.....	3
2.3.2	The harvest sector.....	4
2.3.3	The processing sector	5
2.3.4	Ex vessel pricing.....	8
2.3.5	First wholesale and consumer markets	10
2.3.6	Communities.....	10
2.3.7	St. George	11
2.3.8	St. Paul.....	12
2.4	Analysis of alternatives	13
2.4.1	Status quo	13
2.4.2	Alternatives to establish a new cooling off period and renew rights of first refusal	14
2.4.3	Net benefits to the Nation.....	16
3	REGULATORY FLEXIBILITY ANALYSIS	16
3.1	Introduction	16
3.1.1	Definition of a Small Entity.....	17
3.2	A description of the reasons why action by the agency is being considered.....	19
3.3	The objectives of, and the legal basis for, the proposed rule.....	19
3.4	A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply.....	19
3.5	A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule	20
3.6	An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule	20
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.....	20
4	NATIONAL STANDARDS & FISHERY IMPACT STATEMENT	21
4.1	National Standards.....	21
4.2	Section 303(a)(9) – Fisheries Impact Statement.....	23
5	REFERENCES	24
	APPENDIX A. Contract terms establishing a right of first refusal	25

List of Tables

Table 1. Catcher vessel owner quota share holdings as a percent of the catcher vessel owner share pool...	5
Table 2. Catch and number of catcher vessels harvesting IFQ by share region in the Bering Sea <i>C. opilio</i> fishery (2005-2006 and 2006-2007).	5
Table 3. Processing quota share holdings as a percent of the processing quota share pool.....	6
Table 4. PQS regional and right of first refusal designations (2006-2007).	7
Table 5 prices by species, 2001-2006 (dollars /pound).....	9
Table 6. First wholesale prices of crab species by product type (2001-2005).	10
Table 7. Distribution of processing in the Bristol Bay red king crab and Bering Sea <i>C. opilio</i> fisheries prior to the rationalization program (2001-2005).	11

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 shares corresponding to a portion of the harvest share pool. Processor shares were allocated to processors based on their respective processing histories. To protect community interests, most processing shares were required to be used in the community in which the processing history occurred during the first two years of the program (the ‘cooling off period’). In addition, 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. The agreements also specify that under certain conditions, the right of first refusal will lapse. Due, in part, to intervening circumstances, and notwithstanding these protections, no shares designated for processing in the City of St. George were processed in that community during the first two years of the rationalization program. This action considers establishing a new ‘cooling off period’ and revising the conditions under which the right of first refusal will lapse with respect to those shares.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of the alternatives to revise the ‘cooling off period’ and rights of first refusal for shares associated with the City of St. George. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.¹

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). Throughout this analysis, this document is referred to as the “Crab EIS”.

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.

¹ 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 potential economic redistributive and production efficiency effects arising from the exemption of certain custom processing from the processor share use caps. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

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 intent of community protection measures in the crab rationalization program may not have been met in St. George due to unavoidable circumstances, including a Federal declared disaster. While processing history was generated from St. George, no crab has been processed in St. George under the crab rationalization program. As a result, the two year “cooling off” period will expire June 30, 2007 and the three year right of first refusal (ROFR) will expire June 30, 2008, if IPQ designated for St. George is not used in the community in the 2007/2008 season.

In order to fulfill the original intent of the community protection measures, the Council will initiate an analysis for an FMP amendment to the community protection provisions. The amendment will restart and/or extend the time period for community protection measures (ROFR and “cooling off” period) for St. George. NMFS has indicated that such an amendment will likely not be in place for the 2007/2008 season. However, the intent of the community protection measures may be met by extending the measures into the future.

2.2 Description of Alternatives

The Council has identified the following two alternatives for this action:

Alternative 1: Status quo

Alternative 2: A processor that holds St. George IPQ is subject to a two year cooling off period and a new right of first refusal three year agreement with a starting date of October 1, 2009 – unless that processor and the community entity provide proof to NMFS that they have otherwise entered into a written contract that addresses both the cooling off period and the right of first refusal.

Alternative 3: A processor that holds St. George IPQ is subject to a one year cooling off period and a new right of first refusal three year agreement with a starting date of October 1, 2009 – unless that processor and the community entity provide proof to NMFS that they have otherwise entered into a written contract that addresses both the cooling off period and the right of first refusal.

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 relevant descriptions of the harvesting and processing sectors in the fisheries and background on communities that depend on the fisheries that could be affected by this action. Since St. George cooling off protections and rights of first refusal apply only to processor shares in the Bering Sea *C. opilio* fishery, much of the information applies only to that fishery. Information from other fisheries is intended to provide a very general overview of the distribution of activities across all fisheries.

2.3.1 Management of the fisheries

Nine Bering Sea and Aleutian Island crab fisheries are managed under the rationalization program. Under the program, holders of LLP licenses endorsed for a fishery were issued vessel owner quota shares (QS), which are long term limited access privileges to a specific share of the annual total allowable catch, based on their qualifying harvest histories in that fishery. Catcher processor license holders were allocated catcher processor vessel owner QS for their history as catcher processors; catcher vessel license holders were issued catcher vessel QS based on their history as a catcher vessel. QS annually yield individual fishing quota (IFQ), which are privileges to harvest a particular amount of crab in pounds in a given season. 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 unused individual processor quota (IPQ).² The remaining 10 percent of these annual IFQ are issued as “B shares” or “Class B IFQ,” which may be delivered to any processor.³ 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 TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.⁴

In addition to processor share landing requirements, Class A IFQ (along with IPQ) 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

² Currently, the C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ landing privileges during the first three years of the program. During that period, the IPQ corresponding to the C share allocations are withheld.

³ The terms “A share” and “Class A IFQ” are used interchangeably in this paper, as are the terms “B share” and “Class B IFQ”.

⁴ 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 entire IFQ allocations as A shares (and are not allocated B shares). The rationale for issuing only A shares to PQS holders and their affiliates is that these persons do not need the extra negotiating leverage derived from B shares. To maintain 10 percent of the 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).

Eastern Aleutian Islands golden king crab – South of 56°20'N latitude
Western Aleutian Islands golden king crab – Undesignated/West (west of 174°W longitude)

During the first two years of the program, most processing shares were subject to a ‘cooling off’ period limitation. This provision required the landings made using these shares to be processed in the community in which the historic processing took place that led to the allocation of the shares (the ‘community of origin’). Regulations allow processing outside of the community of origin, only if processing in that community is prevented by a circumstance that:

1. is unavoidable,
2. is unique to the IPQ permit holder or the processing facility used in the community,
3. is unforeseen and reasonably unforeseeable,
4. has occurred, and
5. the IPQ holder has taken all reasonable steps to overcome (see 50 CFR 680.42(b)(4)(ii)).

Most processing shares are also subject to a right of first refusal, under which an entity identified by the community of origin is provided a right of first refusal on the transfer of any shares for use outside the community. The right of first refusal is triggered by any sale of PQS, under which the buyer does not commit to use 80 percent of the IPQ yielded by the PQS in the community during 2 of the 5 years following the transfer. For the exemption to apply to a transfer, the buyer must grant a right of first refusal to the community entity. In addition, the right of first refusal applies to transfers of IPQ, if more than 20 percent of a PQS holder’s community based IPQs (on a fishery by fishery basis) has been processed outside the community of origin by another company in 3 of the preceding 5 years. Rights of first refusal are not permanent under the program, but lapse if the IPQ, are used by the holder of the PQS outside of the community for a period of three consecutive years.⁵

Processing shares are subject to a 30 percent use cap, which applies to both share holdings and the physical processing of crab by an entity. The Council recently adopted an amendment that would exempt custom processing from the use caps, provided the processing occurs in a first or second class city or in a home rule city at a dock or docking facility.⁶ In all cases, an entity’s share holdings would count toward the entity’s use cap. This amendment will take effect on approval of the Secretary of Commerce.

2.3.2 The harvest sector

Under the rationalization program, QS are allocated in two types. Vessel owner shares are allocated for 97 percent of the fishery; crew shares are allocated for the remaining 3 percent of the fishery. Both share types are divided among catcher vessels and catcher processors, depending on the type of operation that led to the initial allocation. Catcher vessel QS carry regional designations, which apply to annual allocations of Class A IFQ. The regional distribution of shares differs with historic landing patterns, which arose from the geographic distribution of fishing grounds and processing activities. Currently, A shares, which are subject to IPQ and regional landing requirements, are only allocated to holders of catcher vessel owner QS (see Table 1). Catcher vessel crew shares are scheduled to be subject to those limitations after the third year of the program, but the Council has passed an amendment to extend the exemption of those shares from IPQ and regional landing requirements indefinitely. That amendment will take effect on approval of the Secretary of Commerce.

⁵ A full description of the required contract is contained in Appendix A.

⁶ The action also specifically exempts any custom processing in the community of Atka from the use caps, as docking facilities are unavailable in that community.

Table 1. Catcher vessel owner quota share holdings as a percent of the catcher vessel owner share pool.

Fishery	Share holdings by region						Across regions			
	Region	QS holders	Percent of pool	Mean holdings	Median holdings	Maximum holding	QS holders	Mean holdings	Median holdings	Maximum holding
Bristol Bay red king crab	North	32	2.5	0.08	0.04	0.24	236	0.42	0.36	3.60
	South	234	97.5	0.42	0.36	3.60				
Bering Sea <i>C. opilio</i>	North	202	46.9	0.23	0.17	1.35	221	0.45	0.43	2.85
	South	205	53.1	0.26	0.19	2.82				
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	234	100.0	0.43	0.33	2.83	234	0.43	0.33	2.83
Western Bering Sea <i>C. bairdi</i>	Undesignated	234	100.0	0.43	0.33	2.85	234	0.43	0.33	2.85
Eastern Aleutian Island golden king crab	South	13	100.0	7.69	6.98	21.39	13	7.69	6.98	21.39
Western Aleutian Island golden king crab	Undesignated	13	50.0	3.84	1.82	20.46	13	7.69	3.31	45.51
	West	9	50.0	5.56	2.33	25.04				
Western Aleutian Island red king crab	South	32	100.0	3.13	0.88	22.09	32	3.13	0.88	22.09
St. Matthew Island blue king crab	North	121	78.3	0.65	0.58	3.43	132	0.76	0.65	4.54
	South	84	21.7	0.26	0.14	2.23				
Pribilof red and blue king crab	North	85	67.5	0.79	0.55	3.10	112	0.89	0.53	3.43
	South	76	32.5	0.43	0.28	2.82				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2007-2008.
 Note: These share holdings data are publicly available and non-confidential.

During the first two years of the program, the distribution of catch across the fleet of catcher vessels varies across regions and fisheries. As expected, the number of vessels in a region rises with the share of the TAC allocated to the region. In the Bering Sea *C. opilio* fishery, most vessels participated in both regions, with catch fairly equally distributed across the two regions, as is the TAC (see Table 2). No data could be revealed for the Western Aleutian Islands golden king crab fishery, since fewer than three catcher vessels participated in that fishery in the West region, in each of the first two years of the program.

Table 2. Catch and number of catcher vessels harvesting IFQ by share region in the Bering Sea *C. opilio* fishery (2005-2006 and 2006-2007).

opilio harvests

Season	Region	Number of vessels	Harvest (as a percent of total allocation)		
			Mean harvest	Median harvest	Average of four largest harvests
2005 - 2006	All	75	1.24	1.01	3.59
	North	59	0.63	0.47	1.86
	South	69	0.61	0.38	1.99
2006 - 2007	All	66	1.38	1.11	4.14
	North	43	0.86	0.75	1.95
	South	54	0.78	0.56	2.50

Source: RAM crab IFQ database (2007).

Note: "All" includes catch of Class B IFQ and C share IFQ.

2.3.3 The processing sector

Under the crab program, crab harvested with Class A IFQ, which make up 90 percent of the catcher vessel owner share allocation, must be delivered to the holder of IPQ. The remaining 10 percent of harvests made with catcher vessel owner shares (harvest made with Class B IFQ) are open to competition among all processors (including those who do not hold processing shares). PQS holdings are substantially more concentrated than catcher vessel owner QS holdings (see Table 3).

Table 3. Processing quota share holdings as a percent of the processing quota share pool.

Fishery	Share holdings by region					Across regions			
	Region	QS holders	Mean holding	Median holding	Maximum holding	QS holders	Mean holding	Median holding	Maximum holding
Bristol Bay red king crab	North	2	1.28	1.28	2.33	16	6.25	2.60	23.16
	South	16	6.09	2.60	20.83				
Bering Sea <i>C. opilio</i>	North	8	5.87	5.51	15.46	20	5.00	2.08	25.18
	South	18	2.95	0.25	9.72				
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	23	4.35	0.83	24.26	23	4.35	0.83	24.26
Western Bering Sea <i>C. bairdi</i>	Undesignated	23	4.35	0.83	24.26	23	4.35	0.83	24.26
Eastern Aleutian Island golden king crab	South	8	12.50	6.04	45.91	8	12.50	6.04	45.91
Western Aleutian Island golden king crab	Undesignated	8	6.25	0.41	33.29	9	11.11	1.03	62.98
	West	9	5.56	0.49	29.69				
Western Aleutian Island red king crab	South	9	11.11	1.03	62.98	9	11.11	1.03	62.98
St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	12	8.33	5.06	32.67
	South	9	2.41	1.76	7.81				
Pribilof red and blue king crab	North	6	11.26	12.01	23.28	14	7.14	3.17	24.49
	South	11	2.95	0.98	13.50				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2007-2008.

Note: These share holdings data are publicly available and non-confidential.

In addition to regional landing requirements that apply to most processor shares, most processor share allocations are also subject to the two other different geographic provisions. Most processor quota shares are subject to a “cooling off” provision, which required IPQ to be used in the “community of origin” (or community of the processing history that led to the initial allocation of those processing quota shares) subject to minor exceptions.⁷ In addition, most processor shares are subject to a ‘right of first refusal’, held by an entity designated by the community of origin.⁸ The right is triggered by the sale of shares for use outside the community of origin. The right of first refusal is a weak protection in some respects. It does not apply to the use of shares outside the community of origin by the PQS holder.⁹ In addition, the right lapses after 3 consecutive years of use of IPQ outside of the community of origin by the PQS holder. The right also does not apply to transfers of IPQ, unless a person other than the PQS holder has used more than 20 percent of the IPQ outside the community of origin in three of the five years preceding the IPQ transfer. The permeability of the right of first refusal limits its potential to prevent the migration of processing from the community of origin.

Since the “cooling off” provision limited movement of processing from the community of origin during the first two years of the program, the distribution of processing of landings in the first two years of the program may not be representative of future landings distributions. The distribution of rights of first refusal should provide a reasonable indication of the starting point of the distribution of processing across communities (see Table 4).¹⁰ St. George has a historic interest in 9.7 percent of the IPQ in the Bering Sea *C. opilio* fishery. Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of St. George to those shares. No shares in other fisheries are subject to St. George-based rights of first refusal. In reviewing the distribution of rights of first refusal, it should be noted that changes are likely to occur as processors move shares to realize efficiencies in the fisheries. Since the

⁷ Movement of the lesser of 10 percent and 500,000 pounds of the IPQ from a community of origin annually during the cooling off period is permitted.

⁸ In addition, the entity designated jointly by the City of Kodiak and Kodiak Island Borough has a right of first refusal on PQS initially allocated based on processing in communities in the Gulf of Alaska north of 56°20’N latitude.

⁹ Use of IPQ by a PQS holder in another community (without transferring the PQS (or IPQ yielded by the PQS) to another person) does not trigger the right of first refusal.

¹⁰ The distribution of community interests differ slightly under the cooling off period and the right of first refusal. Cooling off protections operate at the borough level, if a borough exists, and, if not, at the city level. The right of first refusal entity is jointly appointed by the city and borough, if both exist, and by the applicable community government, if only one exists.

right of first refusal does not apply to all transfers of IPQ and does not apply to the processing of shares by the PQS holder outside of the community of origin, that provision should be viewed as only a starting point for the examining the geographic distribution of processing. Changes in the distribution of processing are likely to vary with conditions in the fisheries and cannot be predicted.

Table 4. PQS regional and right of first refusal designations (2006-2007).

Fishery	Region	Community of Right of First Refusal	Number of PQS holders	Percent of PQS pool
Bristol Bay red king crab	North	St. Paul	2	2.6
		Akutan	1	19.9
		False Pass	1	3.7
		King Cove	1	12.8
	South	Kodiak	3	3.8
		None	3	2.7
		Port Moller	3	3.5
		Unalaska	11	51.1
		Total	16	97.4
Bering Sea <i>C. opilio</i>	North	None	3	1.0
		St. George	2	9.7
		St. Paul	6	36.3
		Total	8	47.0
	South	Akutan	1	9.7
		King Cove	1	6.3
		Kodiak	4	0.1
		None	4	1.8
		Unalaska	12	35.0
		Total	18	53.0
E. Aleutian Islands golden king crab	South	Akutan	1	1.0
		None	1	0.9
		Unalaska	7	98.1
Pribilof Island red and blue king crab	North	None	1	0.3
		St. Paul	5	67.3
		Total	6	67.5
	South	Akutan	1	1.2
		King Cove	1	3.8
Kodiak		4	2.9	
		Unalaska	5	24.6
		Total	11	32.5
St. Matthews blue king crab	North	None	5	64.6
		St. Paul	4	13.8
		Total	9	78.3
	South	Akutan	1	2.7
		King Cove	1	1.3
Kodiak		1	0.0	
		Unalaska	6	17.6
		Total	9	21.7
W. Aleutian Islands golden king crab	Undesignated	NA	9	50.0
	West	NA	10	50.0
W. Aleutian Islands red king crab	South	NA	10	100.0

Source: NMFS RAM PQS holdings 2006-2007.

Despite the limitation of the ‘cooling off’ provision, in the first two years of the program, no processing occurred in the City of St. George. In both of those years, PQS holders petitioned NOAA Fisheries for an exemption from the limitation of the ‘cooling off’ period, claiming unavoidable circumstances prevented their processing of shares in St. George. In both years, NOAA Fisheries granted the exemption concluding that an unavoidable circumstance prevented processing in the St. George harbor. Specifically, NOAA Fisheries found that storm damage to the breakwater at the harbor in St. George prevented safe entry of processing vessels to the St. George harbor. With no other location available to safely process in

St. George, NOAA Fisheries granted the waiver of the ‘cooling off’ requirement. In the first year of the program, the waiver was uncontested by St. George. In the second year, St. George contested NOAA Fisheries finding. That appeal is currently under consideration. Harbor repairs are underway in St. George; and debate remains as to whether processing can be safely undertaken at St. George.¹¹

An additional factor that could affect the future distribution of processing is the exemption of certain custom processing from use caps. The exemption was adopted as a part of the reauthorization of the Magnuson Stevens Act in 2007. Since 47 percent of the IPQ in the Bering Sea *C. opilio* fishery is required to be landed in the North region, the provision is necessary for all processing of IPQ in the fishery to take place in a single facility. Whether the provision will affect the movement of processing from St. George is uncertain. In the first two years of the program, processing moved from St. George to multiple facilities in the North region. In addition, in the absence of the exemption, two facilities outside of St. George would be required to operate in the North region to maintain the distribution of processing required by the ‘cooling off’ provision, as more than 30 percent of the IPQ was required to be processed in St. Paul under the requirements of the ‘cooling off’ provision. As a result, the affect of the custom processing exemption on the movement of IPQ processing away from St. George is likely to be limited.

2.3.4 Ex vessel pricing

Assessing ex vessel prices under the rationalization program is complicated by several factors. The two different catcher vessel owner IFQ types may bring different prices because of the different limitations on use of those shares and the effects of the arbitration program. The two different types of IFQ that are unrestricted by limits on landings (catcher vessel owner Class B IFQ and C share IFQ¹²) could bring different prices because of the difference in negotiating leverage of their holders. Data limitations, however, complicate efforts to discern differences in ex vessel prices across the share types. The most obvious source of information for establishing such leverage would be price information from deliveries. Current data sources, however, do not provide final prices by share type. The only data that show price by share type are elandings data collected by NOAA Fisheries. These data are collected at the time of landing and do not include any post-landing adjustments or bonuses, which are reported to be an important part of pricing under current practices. Those data suggest that on average B and C share landings received a premium relative to A share landings. The exception is the *C. bairdi* fishery in the first year of the program, when C shares received a lower price on landing than harvests by the other share types. Specific elandings prices are not reported here because the amount of any premium on B share and C share landings may not be accurate, since post-landing bonuses are not included in any prices.

¹¹ Attached as Appendix B are letters documenting NOAA Fisheries finding of unavoidable circumstances.

¹² C shares are generally 3 percent of the QS and IFQ pools and are allocated for the exclusive use of captains and crew who work on vessels in the fisheries. These shares are not limited by the IPQ landing requirements, and therefore, are not affected by this action.

Table 5 prices by species, 2001-2006 (dollars /pound)

Year	Golden king crab	<i>C. opilio</i>	Red king crab	<i>C. bairdi</i>
2001	3.37	1.55	4.83	2.16
2002	3.46	1.39	6.21	2.20
2003	3.62	1.85	5.14	2.46
2004	3.15	2.07	4.69	2.59
2005	2.89	1.81	4.50	1.85
2006	2.18	1.15	3.85	1.52

Source: ADFG Commerical Operators Annual Reports

Final price data are available for the various species harvested in the program (see **Error! Reference source not found.**). These data, however, are not collected by fishery and include catch from fisheries other than those subject to the rationalization program. Although catch from the rationalization program dominate these data, in some cases catch from other fisheries may affect final prices observed in these data. Overall, the data do show a declining price trend, which accurately characterizes price changes in recent years in the fisheries.

Participants in the fisheries report that the extent to which B and C share deliveries have drawn a premium varies across processors and fisheries. Some processors (including processors not holding IPQ) are reported to have paid bonuses to attract deliveries of B share harvests. Participants report that premiums for B and C share deliveries are typically a few cents, but have ranged as high as approximately ten cents. Some processors have chosen not to compete for landings of B share and C share harvests, but have accepted deliveries of B and C share harvests at the same price as A share landings.¹³ Under these circumstances, the B and C share harvests received by the processor have typically come from the same fleet delivering A share harvests. In some cases, B and C share deliveries are reported to have brought lower prices than A share deliveries. This conclusion would appear to be supported by the average reported price in elandings data for C share deliveries in the *C. bairdi* fisheries, which was lower than the average reported price for A share deliveries in the first season.

Several factors have affected the extent to which landings made with unrestricted shares have drawn a premium in the market. In the first two years of the program, crab markets have been at some of their lowest levels in recent years. In such a market, it is possible that the difference between a competitive price and the price arrived at through the arbitration standard is relatively small. Even in better markets, it is possible that the standard, under which the historic division of revenues is a primary consideration, would result in a price similar to the competitive price. Those historic prices were determined in a competitive market, but one under a different management structure that may have affected the distribution. In addition, some harvesters are reported to have used B and C shares to realize efficiencies in harvesting. For example, in some instances, B and C share harvests have supplemented partial deliveries of A shares, to limit the need for an additional trip to harvest and independently market, the B and C share catch). Also, when making A share harvests, some harvesters avoid underages that would require an additional trip, knowing that B and C shares can be used to cover any A share harvest overage. These uses of B and C shares clearly benefit harvesters, but detract from the use of B and C shares to pursue competitive markets.

¹³ Some participants have suggested that processors are reluctant to bid up the price for B shares, in part, because they fear that arbitrators may simply equate A share ex vessel prices with B share ex vessel prices.

2.3.5 First wholesale and consumer markets

This section briefly summarizes market conditions in the first two years of the program and the expected market condition in the coming year using the market report produced for participants in the arbitration system. A brief summary of recent first wholesale prices is also included.

Crab markets, in general, suffer from great volatility. Red king crab markets and prices are greatly influenced by Japanese demand, U.S. demand, and Russian production. In the first year of the program (2005), the Russian supply of red king crab increased substantially, pushing prices down substantially. In the second year, a drop in Russian production and a more aggressive Japanese market buoyed prices of red king crab. That recovery in prices has continued to date and is expected to continue (Sackton, 2007a).

Like red king crab prices, prices for *C. opilio* (snow crab) are greatly influenced by Japanese demand and U.S. demand. In the *C. opilio* market, however, the primary competition in production is the east coast of Canada. In the first year of the program, prices for *C. opilio* reached extremely low levels due to poor demand in both the Japanese and U.S. markets. In the second year, the price recovered, approaching all time highs stimulated in part by demand from buyers drawn to the snow crab market by the low prices in the preceding year. In the coming year, it is possible that prices could decline significantly, particularly from build up of Canadian inventories or if sellers of crab appear to eager to sell their product. *C. bairdi* prices have generally tracked closely with *C. opilio* prices, with *C. bairdi* drawing a premium over *C. opilio* (Sackton, 2007c).

In the first year of the program, Aleutian Islands golden king crab prices declined substantially, tracking the price for red king crab products. In the second year an abundance of competing small sized red king crab imports further weakened prices. Going into the third year of the program it is thought that the price recovery could be stalled, as the increase in demand for golden king crab does not seem to have leveled. Overall, the increase in demand for crab products is expected to result in either stable or rising prices for golden king crab in the coming year (Sackton, 2007b).

First wholesale prices for red and golden king crab show a notable decline in 2005, the first year of the rationalization program (Table 6). The price drop is not evident in for *C. opilio*, likely because that fishery is prosecuted early in the year, so these data reflect prices for production from the January 2005 fishery.

Table 6. First wholesale prices of crab species by product type (2001-2005).

Species	Product	2001	2002	2003	2004	2005
Red King Crab	Shellfish Sections	8.93	11.58	9.82	9.25	8.52
	Whole	5.14	9.80	8.26	8.40	7.94
Golden King Crab	Shellfish Sections	6.95	7.58	7.89	6.02	6.00
	Whole	5.17	4.99	5.76	5.83	5.59
<i>C. opilio</i> (snow) crab	Shellfish Sections	3.73	3.58	4.40	4.79	3.85
	Whole	*	*	*	*	*

Source: ADFG COAR data.

*Prices with fewer than 4 observations are confidential.

2.3.6 Communities

Several communities have historically been home to processors that have taken delivery of crab from the Bering Sea and Aleutian Islands crab fisheries. Limited information concerning the geographic distribution of processing in the crab fisheries can be released because relatively few processors participate in the fishery in any location. In the years preceding implementation of the rationalization program, only data from the Bristol Bay red king crab and the Bering Sea *C. opilio* fisheries can be released (see Table 7). In addition, activity on floating processors may be associated with a particular

community, but is not attributed to community in these records. Whether processing occurred in St. George during his period is not known, since all historic processing in St. George has occurred on floating processors.

Table 7. Distribution of processing in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries prior to the rationalization program (2001-2005).

Fishery	Year	Communities	Number of processors	Pounds processed*	Percent of processed pounds
Bristol Bay red king crab	2001	Adak, Akutan, King Cove, Floaters	6	2,663,437	34.7
		Dutch Harbor	5	3,902,545	50.8
		Catcher processors	6	312,939	4.1
		Kodiak	6	798,932	10.4
	2002	Akutan, King Cove, Floaters	6	3,372,188	38.5
		Dutch Harbor	6	4,276,910	48.8
		Catcher processors	8	300,425	3.4
		Kodiak, St. Paul	4	820,497	9.4
	2003	Akutan, King Cove, Sand Point, Floaters	10	5,207,419	36.6
		Dutch Harbor	7	7,131,382	50.1
		Catcher processors	8	680,080	4.8
		Kodiak, St. Paul	5	1,218,494	8.6
	2004	Akutan, St. Paul, King Cove, Floaters	7	5,932,888	42.7
		Dutch Harbor	6	6,504,531	46.8
		Catcher processors	8	602,749	4.3
		Kodiak	4	848,879	6.1
Bering Sea <i>C. opilio</i>	2001	Akutan, King Cove, Kodiak	3	1,889,513	8.2
		Dutch Harbor	5	7,916,618	34.5
		Catcher processors	7	3,099,567	13.5
		St. Paul, Floaters	8	10,034,268	43.7
	2002	Dutch Harbor, King Cove, Kodiak	9	13,646,381	46.1
		Catcher processors	8	1,671,036	5.6
		St. Paul, Floaters	8	14,292,205	48.3
	2003	Akutan, King Cove, Kodiak	3	2,162,245	8.5
		Dutch Harbor	6	10,308,648	40.6
		Catcher processors	5	803,452	3.2
		St. Paul, Floaters	8	12,135,777	47.8
	2004	Akutan, King Cove, Kodiak	4	2,287,481	10.4
		Dutch Harbor	6	8,714,351	39.7
		Catcher processors	6	664,660	3.0
		St. Paul, Floaters	8	10,273,001	46.8
	2005	Akutan, King Cove, Kodiak	3	2,206,008	9.7
Dutch Harbor		6	9,759,358	43.1	
Catcher processors		6	648,967	2.9	
St. Paul, Floaters		5	10,041,444	44.3	

*Excludes deadloss.
Source: ADF&G fish ticket data

Since this action will only affect the distribution of landings in the North region of the Bering Sea *C. opilio* fishery, only the two Alaska communities in the North region with direct links to the rationalized BSAI crab fisheries are profiled. These communities are St. Paul and St. George. Additional information concerning these communities can be found in the EIS.

2.3.7 St. George

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. Snopac Seafoods, the most consistent processor in the community, has a bunkhouse that it uses for housing non-resident processing workers, who work on their floating platform. St. George is also home to Puffin Seafoods, a small fish handling facility that purchases halibut from the local fleet. These landings are typically tendered to St. Paul for processing at its shore plant. St. George is an eligible CDQ community represented by Aleutian Pribilof Island Community Development Association. Puffin Seafoods has been in business since 1998 and is a joint venture between Aleutian Pribilof Island Community Development Association Joint Ventures and St. George Fishermen's Association.

Approximately 10 commercial fishing permits are issued to residents of St. George and approximately 10 residents own vessels. Residents are engaged exclusively in the fixed gear fisheries, primarily for halibut.

In 1999 two processors operated in St. George; and in 2000, only one operated in the community. Since 2000, little or no crab processing has taken place in St. George. Prior to the rationalization program, the loss of processing activity is 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 has prevented deliveries to the community during the first two years of the program. The harbor’s break wall has been repaired; however, the harbor is not accessible to floating processors or the large harvesting vessels that participate in the crab fisheries. Harbor repairs are scheduled to be completed in the summer of 2008. Whether the community can attract crab landings in the future depends in large part on its ability to provide harbor access that is perceived to be safe by participants in the fishery.

The community has experienced a large decline in revenues in recent years. Operating revenues in 1999 and 2000 were approximately \$2.6 million and \$1.7 million, respectively. In 2005, operating revenues declined to slightly more than \$500,000, approximately one-third of the 2000 level and one-fifth of the 1999 level. These drops are largely attributed to the absence of crab processing (see NPFMC/NMFS 2004a; DCCED, 2008).

2.3.8 St. Paul

As with St. George, 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. As noted above, a number of floating processors have also frequented the area. Icicle, Norquest, Trident, and Stellar Seafoods own floaters that have recently processed crab in the Pribilof Islands. Other processors also have used floaters to process crab in and around St. Paul over the years. Further description of the processing activity in the Pribilof Islands area cannot be included in the profile due to data confidentiality restrictions.

During 1991 to 2000, snow crab accounted for 74 percent to 100 percent of the relevant BSAI crab processing in the northern region. During this same period, the northern region accounted for approximately 31 percent of the total processing value of the fishery. For the period 1995-1999, the northern region accounted for 43 percent of the total processing value of the fishery. The sharp decline in the GHL, from 1999 to 2000, resulted in a drop in the harvest and drop in the percentage of the total snow crab processed in the northern region, from 49 percent in 1999, to 18 percent in 2000. Overall, the decline in snow crab stocks during that period had a disproportional effect on the community of St. Paul, compared to other communities that process snow crab.

The shift away from St. Paul, to other communities, during this downturn in snow crab stock is estimated to be due to the slow down in fishing pressure during that period. Data from interviews with harvesters suggest that shorter seasons (and/or lower harvest levels), among other factors, have resulted in a higher proportion of crab being taken further from the grounds (away from St. Paul) for processing.

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.

2.4 Analysis of alternatives

This section examines the effects of the three alternatives. Since the effects of the proposed alternatives are relatively straightforward and transparent, the effects are consolidated into a single section for each alternative.

2.4.1 Status quo

Under the status quo, the cooling off provision expired at the end of the 2006-2007 season, allowing IPQ holders to move their shares out of the community of origin. Although the ‘cooling off’ protection has lapsed, the protection of the rights of first refusal remains in effect during the term of that contract. Yet, the protection lapses, if the PQS holder uses its IPQ outside the community of origin for a period of 3 consecutive years. Given that no processing has occurred in St. George during the first two years of the program, if PQS holders choose to move their IPQ processing out of that community for the third year of the program, all rights of first refusal to Aleutian Pribilof Island Community Development Association would lapse under the terms provided for in regulation. On the lapsing of those interests, no regulatory or contractual connection between any PQS and the community of St. George would exist.

Although the rights of first refusal would lapse under the terms required by the crab program, Aleutian Pribilof Island Community Development Association has reached agreement with one PQS holder, who holds approximately 4 percent of the Bering Sea *C. opilio* PQS, concerning their movement of processing from St. George in the second year of the program. Since the terms of that agreement are subject to a confidentiality agreement between the parties, it is not known whether processing will be required to occur in St. George or some other benefits will be conveyed to the community in lieu of movement of processing activity to the community. If the agreement requires that processing be undertaken in St. George, it is also not known whether the term of that processing will be for a longer or shorter period than would be required by this action. Likewise, the agreement may also include some rights of first refusal on transfers of PQS and IPQ. It is not known how those terms (if any exist) might differ from those of the rights of first refusal required by the rationalization program.

Aleutian Pribilof Island Community Development Association has not reached agreement with the second PQS holder, who holds slightly less than 6 percent of the Bering Sea *C. opilio* PQS, concerning its shares. Shares held by that PQS holder are subject to the right of first refusal required by the rationalization program, which would lapse, if those PQS are used outside of St. George for three consecutive years. Given that no processing occurred in St. George in the first two years of the program, it is possible that the right could lapse this year, if the shares are processed outside of the community this year. If the current trend were to continue, it is likely that any tie of these shares to the St. George would be severed after this year. While these shares (and potentially other North region shares) could be processed in St. George in the future, the decision to process those shares in St. George would be wholly within the discretion of the PQS holder. In addition, St. George would have no recourse in the event the shares are transferred with the intent to immediately use the shares outside of St. George.¹⁴

Under the status quo, PQS holders subject to a St. George association are likely to have the ability to realize any processing efficiencies that might be available by processing their shares in the North region outside of St. George. Efficiencies may be realized by saving any added costs of movement of a floating processor and crews to St. George and any associated permitting with operating in St. George. These additional processing costs likely depend on other processing operations in the North region, which may vary year-to-year. In years when a floating processor will be operated in St. Paul, those costs are likely to be substantially lower, since the processor would only need to be repositioned in St. George for a portion

¹⁴ Under the current right of first refusal provisions, the community would have a right of first refusal, in the event the shares are transferred for use outside of the community.

of the season to receive landings from St. George associated PQS. In years when no floater is being operated in St. Paul, the costs of positioning a floating processor in St. George are likely to be substantially higher.¹⁵ These costs could be reduced, if the PQS holders are able to arrange for process of their shares by a catcher processor that is active in the fishery. Whether a catcher processor that is suitable for taking deliveries from catcher vessels is available is uncertain.

The effects of the action on harvesters are likely to be limited. Concentration of processing that could occur under the status quo could result in slight operating costs savings to harvesters who might otherwise have needed to make partial deliveries to multiple locations in the North (e.g., St. George and St. Paul). These additional costs are likely to vary depending on share matching and coordination of harvest and are likely to be less prevalent in years of high TACs, when more crab are required to be delivered into St. George (limiting the number of partial deliveries).¹⁶

Under the status quo, the cooling off period would not be renewed, limiting the burden on managers to monitor compliance with that provision. Removal of this burden with respect to St. George associated shares has a very minor effect on management costs. Similarly, the choice not to revise the provision for lapse of the removal of rights of first refusal through use of the shares outside the community will have a relatively minor effect on management costs.

2.4.2 Alternatives to establish a new cooling off period and renew rights of first refusal

Under the second and third alternative, a new cooling off period would be established and rights of first refusal would be renewed. The two alternatives vary only in the length of the new cooling off period. Alternative 2 would establish a cooling off period two years, while alternative 3 would establish a cooling off period of only one year. As a consequence, the effects of the two alternatives are very similar, with the difference under the alternatives primarily being the tenure of the effects.¹⁷ Under both of the alternatives, the new cooling off period and extension of the right of first refusal is suspended, if the PQS holder and the holder of the rights of first refusal reach an agreement concerning both the cooling off period and rights of first refusal. The terms of the agreement must only satisfy the parties and are not subject to review by NOAA Fisheries.

The new cooling off period could ensure that processing occurs in St. George for that period. Processors holding these shares would likely lose some production efficiency by being required to locate a floating

¹⁵ Under the MSA amendment to the applicability of processing share caps to custom processing, it is possible that only a single processor might operate in St. Paul in a year. This consolidation could increase the costs, if all processing in St. Paul is undertaken at the shore plant, in which case a floating processor would need to be positioned from the South to operate in St. George.

¹⁶ In addition to the effects of this action on costs, some harvesters assert that St. George harbor is a less safe location for making crab deliveries. Whether they will continue to hold that opinion after repairs to the harbor are fully completed is uncertain.

¹⁷ It is possible, however, that the effects under the alternatives could differ, if the longer termed alternative provides St. George with a better or stronger position with respect to the use or transfer of the shares. For example, if the shares are subject to an extended cooling off period, it is possible that a share holder may be willing to offer different terms, more favorable to St. George, in a transaction concerning the shares. For instance, in the transfer of the shares, it is possible that the more restrictive alternative could provide the holder of the right of first refusal with a better negotiating position, if it wished to intervene in a potential transaction involving the shares, since the shares would need to be processed in St. George for a longer period. The magnitude of this effect, however, is likely to be limited, as the tenure of the cooling off period is only a single, additional year. The settlement of terms between Aleutian Pribilof Island Community Development Association and one of the PQS holders suggests that the holder of the rights of first refusal is willing and able to assert this leverage in negotiations with the PQS holders. Since the terms of that agreement have not been revealed, the potential strength of the negotiating position is uncertain.

processor in St. George to comply with the requirement. In the absence of the requirement, processing would likely be consolidated in St. Paul (most likely through custom processing arrangements).

Processing in St. George under the cooling off provision would be slightly less than 10 percent of all IPQ in the Bering Sea *C. opilio* fishery, or approximately 4.4 million pounds under the current TAC. Processing of this amount of crab would likely occur over three to four weeks. Tax revenues would be gained by the community under both the local fish tax and shared State fish tax, as are gained for any processing within community boundaries. Other effects are likely to be limited since the processing is very likely to occur on a floating processor. Processing workers are typically housed onboard the floating processor and have limited interactions with the community. Most processing workers travel to the processing location on the vessel, limiting further the interaction with the community. Floating processors are largely self-supporting, relying primarily on provisions carried to the processing location on the vessel, particularly for short term processing ventures like that which would be undertaken in St. George.

The effects of the new cooling off period could be increased, if St. George were able to attract additional processing, which might occur given that the cooling off provision would not apply in St. Paul. To the extent that costs might be saved by using a floating processor in St. George only, a potential efficiency could exist for relocating processing to St. George from St. Paul during the new cooling off period. Even if a decision is made to use the floating processor in both communities, it is possible that some additional processing could be drawn into St. George, since shares can be flexibly moved from St. Paul (but not from St. George) during a cooling off period that is applicable only to St. George based PQS.

To the extent that processing moves out of St. Paul (either through the direct requirement of the new cooling off period or through the attraction of additional processing beyond the cooling off requirement), St. Paul would suffer a loss of benefits. These losses to St. Paul would likely include tax revenues and community economic impacts, arising from the shift in processing to St. George. If the provision results in the transfer of processing from the shore plant in St. Paul to a floating processor off St. George, it is possible that the result could be a minor loss of economic impacts to communities in the North region. In considering the importance of any potential loss of local impacts, the effects of those impacts should be balanced against the distributional considerations. Given that St. Paul currently attracts a substantially greater share of crab processing in the North region, it is possible that the decline in local impacts to St. Paul are outweighed by the need to ensure that the smaller economy of St. George benefits from the transfer of economic impacts arising from the processing activity under the new cooling off period. Given the relatively larger economic base in St. Paul and the likelihood that St. Paul will continue to attract substantially larger volumes of crab than St. George, despite the new cooling off period for St. George, it is possible that the potential minor loss of North region economic impacts will be an acceptable compromise for transferring economic activity to St. George.

Once the new cooling off period expires, it is uncertain whether St. George would continue to attract processing. The potential to attract processing would largely depend on whether processors perceive an opportunity to improve operations in St. George. These processor benefits could arise, if St. George is perceived to provide improved services. Currently, Aleutian Pribilof Island Community Development Association has a \$2 million Economic Development Administration grant, which together with \$1 million in committed matching funds, will be used to construct a shore plant in St. George. The plant will be sized to be capable of housing crab lines, but current plans do not include a crab line. If crab delivery commitments are obtained, the plant would be configured to include a crab line. The plant is expected to be operational in 2009. Whether this plant will attract crab deliveries at a future time is not known, and will depend on several factors, including the processing market in St. Paul and TACs in the Bering Sea *C. opilio* fishery.

Alternatively, if the holder of the right of first refusal is able to leverage its improved position derived from the new cooling off period to gain concessions from the affected PQS holders, it is possible that arrangements could be made for extending processing in St. George after the new cooling off period lapses. The added leverage of the right holder and its potential to succeed in any such efforts is uncertain and depends on several factors, including the relative financial position of the PQS holders and the right holder. The settlement of terms between the rights holder and one of the PQS holders suggests that the potential for the rights holder to use this leverage is not wholly hypothetical.

The effects of the extension of the rights of first refusal (which would otherwise lapse) are likely to be minor. The extension of the rights could affect the value of the shares subject to those rights. Rights of first refusal typically dampen the market items subject to those rights, since the party holding the rights can intervene in the transfer. To the extent that the price of processing shares declines during the term of the rights, the processing share holders would suffer that loss. The holder of the rights (and indirectly St. George) benefit from the rights to the extent that it will have the opportunity to intervene in a sale of that will move the shares from the community and to the extent that it can use the right to influence the share holders' decisions concerning the location to take deliveries. Given the flexibility of share holders to move shares outside of the community (and the consequent lapsing of the right), this benefit is relatively minor.

As an alternative to being bound by the specific terms of the extension to the rights of first refusal and the new cooling off period, the processing share holder and the holder of the right of first refusal could enter a private agreement to address the cooling off requirement and right of first refusal requirement at issue. The specific effects of any such agreement are likely to depend on the circumstances of the two parties. The terms are likely to be more beneficial to both parties than the specific terms of the cooling off period and right of first refusal (otherwise the parties would simply rely on specific terms). The terms could extend beyond processing of the shares, such as terms for sale of the shares between the parties, in the event the share holder wished to dispose of them or conditions under which the shares must be processed in St. George. Overall, the parties are likely to benefit from the ability of the agree to terms beyond those specified by the cooling off period and right of first refusal requirements.

2.4.3 Net benefits to the Nation

A minor decline in net benefits to the Nation may to arise from this action. The action is likely to decrease production efficiency for some processors, reducing efficiency that might arise from locating processing outside of St. George.

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:

The intent of community protection measures in the crab rationalization program may not have been met in St. George due to unavoidable circumstances including a federal declared disaster. While processing history was generated from St. George, no crab has been processed in St. George under the crab rationalization program. As a result, the two year “cooling off” period will expire June 30, 2007 and the three year right of first refusal (ROFR) will expire June 30, 2008, if IPQ designated for St. George is not used in the community in the 2007/2008 season.

In order to fulfill the original intent of the community protection measures, the Council will initiate an analysis for an FMP amendment to the community protection provisions. The amendment will restart and/or extend the time period for community protection measures (ROFR and “cooling off” period) for St. George. NFMS has indicated that such an amendment will likely not be in place for the 2007/2008 season. However, the intent of the community protection measures may be met by extending the measures into the future.

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

The objective of the proposed action is to address an unforeseen circumstance that occurred in the first two years of the crab rationalization program that prevented processing from occurring in the community of St. George, as intended by the rationalization program. The original rationalization program included two specific measures intended to protect St. George’s interest in local processing. The first required certain crab processing to occur in that community for the first two years of the program. The second granted a limited right of first refusal on transfers of certain processing shares, if the transfer contemplated use of those shares outside of the community of St. George. This action is intended to ensure that the intended effects of those measures are realized despite the unforeseen circumstance.

Under the current regulatory structure, Bering Sea/Aleutian Islands crab resources are managed by NOAA Fisheries and the State of Alaska, under the FMP. 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

The only entities directly regulated by this action are holders of processor shares, formerly subject to St. George cooling off provision protection and subject to the St. George rights of first refusal, and the entity holding the rights of first refusal on behalf of St. George. Currently, two processors hold processing shares that are subject to the right of first refusal. Estimates of entity size were made, based on available records

of employment (Fried, 2005), information on participation in processing activities in other fisheries, and analysts' knowledge of foreign ownership of vertically integrated processing companies. One of the two processing entities under consideration within this IRFA is estimated to be a small entity.

In addition, the entity holding the rights of first refusal, at issue, is the Aleutian Pribilof Island Community Development Association, a CDQ group. Aleutian Pribilof Island Community Development Association is a not-for-profit group that is not dominant in the overall BSAI fishing industry. Thus, Aleutian Pribilof Island Community Development Association is a 'small entity' or 'small organization' under the RFA.

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 of the proposed rule will not change. As such, this action requires no additional reporting, record keeping, or other compliance requirements.

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 pilot program 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

The following alternatives are being considered for this action:

Alternative 1: Status quo

Alternative 2: A processor that holds St. George IPQ is subject to a two year cooling off period and a new right of first refusal three year agreement with a starting date of October 1, 2009 – unless that processor and the community entity provide proof to NMFS that they have otherwise entered into a written contract that addresses both the cooling off period and the right of first refusal.

Alternative 3: A processor that holds St. George IPQ is subject to a one year cooling off period and a new right of first refusal three year agreement with a starting date of October 1, 2009 – unless that processor and the community entity provide proof to NMFS that they have otherwise entered into a written contract that addresses both the cooling off period and the right of first refusal.

The action directly affects two small entities: 1) the processing share holder that will be subject to the proposed cooling off period requirement and that will be a party to the right of first refusal contract, and 2) the entity that represents the community of St. George that will hold the right of first refusal. Requiring processing to occur in St. George will like reduce production efficiency of the small processor who is subject to this action. In addition, extension of the right of first refusal (which would otherwise lapse) could affect the value of the shares subject to that right. Rights of first refusal typically dampen the

market for transfer of the shares, since the party holding the right can intervene in a transfer. The right is likely to have a limited effect on the processor's interest in the shares, since movement of the shares from the community by the processor for a period of three years will result in a lapse of the right of first refusal.

The extension of the rights of first refusal will benefit the holder of that right by allowing it to intervene in sales that would move the shares from St. George. This benefit is relatively minor, since the shares can be moved from the community by their holder without a sale and the rights lapse, if the shares are moved from the community for three consecutive years. The holder of the rights could benefit from the rights, if the rights provide it negotiating leverage that enable it to either retain processing in St. George beyond the new cooling off period or acquire the shares.

As an alternative to being bound by the specific terms of the extension to the rights of first refusal and the new cooling off period, the processing share holder and the holder of the right of first refusal could enter a private agreement to address the cooling off requirement and right of first refusal requirement at issue. The specific effects of any such agreement are likely to depend on the circumstances of the two parties. The terms are likely to be more beneficial to both parties than the specific terms of the cooling off period and right of first refusal (otherwise the parties would simply rely on specific terms). The terms could extend beyond processing of the shares, such as terms for sale of the shares between the parties, in the event the share holder wished to dispose of them or conditions under which the shares must be processed in St. George. Overall, the parties are likely to benefit from the ability of the agree to terms beyond those specified by the cooling off period and right of first refusal requirements.

Since the action is intended to provide the community of St. George with the benefits of the cooling off period and rights of first refusal that were lost as a result of the inaccessibility of the St. George harbor, the alternatives analyzed for this action are the only alternatives that directly achieve that end. The alternatives mitigate negative effects (or increase positive effects) by allowing the parties to agree to other terms, which may be more beneficial to both parties than the specific cooling off provision and rights of first refusal requirements. No other alternatives achieving these objectives would further mitigate the negative effects on small entities regulated by the action. Consequently, these alternatives comprise the entire suite of alternatives for purposes of the RFA.

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 that prevents 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 residence. The proposed change would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program. 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 could decrease efficiency in the fishery by allowing consolidation of processing activity that would otherwise be prevented by counting custom processing toward the cap of the provider of custom processing services.

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 should reduce processing costs and will not duplicate other actions.

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.

TO BE WRITTEN AFTER SELECTION OF THE PREFERRED ALTERNATIVE

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.

Implementing any one of the alternatives will have no effect on bycatch.

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.

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 harvesting sector and processing sector have been discussed in previous sections of this document. This action will have no effect on participants in other fisheries.

5 REFERENCES

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APPENDIX A. Contract terms establishing a right of first refusal

Contract Terms

- A. The right of first refusal will apply to sales of the following processing shares:
1. PQS and
 2. IPQs, if more than 20 percent of a PQS holder's community based IPQs (on a fishery by fishery basis) has been processed outside the community of origin by another company in 3 of the preceding 5 years.
- B. Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement.
- C. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, IPQs must be used by the same company. In the event that a company uses IPQs outside of the community of origin for a period of 3 consecutive years the right of first refusal on those processing shares (the IPQs and the underlying PQS) shall lapse. With respect to those processing shares, the right of first refusal will not exist in any community thereafter.
- D. Any sale of PQS for continued use in the community of origin will be exempt from the right of first refusal. A sale will be considered to be for use in the community of origin if the purchaser contracts with the community to:
1. use at least 80 percent of the annual IPQ allocation in the community for 2 of the following 5 years (on a fishery by fishery basis), and
 2. grant the community a right of first refusal on the PQS subject to the same terms and conditions required of the processor receiving the initial allocation of the PQS.
- E. All terms of any right of first refusal and contract entered into related to the right of first refusal will be enforced through civil contract law.
- F. A community group or CDQ group can waive any right of first refusal.
- G. The right of first refusal will be exercised by the CDQ group or community group by providing the seller within 60 days of receipt of a copy of the contract for sale of the processing shares:
1. notice of the intent to exercise and
 2. earnest money in the amount of 10 percent of the contract amount or \$500,000 whichever is less.
- The CDQ group or community group must perform all of the terms of the contract of sale within the longer of:
1. 120 days of receipt of the contract or
 2. in the time specified in the contract.