

**Western Aleutian Islands golden king crab fishery
North Pacific Fishery Management Council
December 2009**

Since the second year of fishing under the Bering Sea and Aleutian Island crab rationalization program, participants in the Western Aleutian Island golden king crab fishery have voiced concerns with a mismatch of processor share holdings and processing capacity in the West region of that fishery. Specifically, the program requires that 50 percent of the catcher vessel Class A IFQ (or approximately 24 percent of the non-CDQ TAC) be landed in the area west of 174° West longitude (the West region). Under the program to date, shore-based crab processing in this region has occurred only in the community of Adak. In the first four years of the program, deliveries to the Adak plant were complicated as the operator of that plant holds few of the processor quota shares in the fishery. Despite this mismatch, holders of processor shares have largely relied on the plant in Adak for West region processing. Until this year, this reliance on a single plant may have contributed to leaving a portion of the TAC unharvested, as a limit on use of processor shares prevented the entire West region allocation being processed at a single plant. To overcome this obstacle, the Council adopted an amendment to the program exempting custom processing in the West region from the use processor share caps, which NOAA Fisheries implemented this year.

Although this regulation would resolve any issue concerning the ability of the Adak plant to process all West region landings from the fishery, in August of this year, the operator of that plant filed for bankruptcy. This filing prompted participants in the fishery to assert that an exemption from the regional landing requirement should be available to address a shortage of processing capacity in the West region. To fully realize the exemption, those participants have made the following two requests:

- (1) NOAA Fisheries use an emergency rule to exempt the holders of West region designated IFQ and IPQ from that regional landing requirement for the 2009-2010 crab fishing season. They request that the exemption apply throughout the year, regardless of whether the Adak plant reopens, suggesting that it is in the interest of all parties to make deliveries and process all landings in Adak, should the plant be available. In addition, the parties assert that they have reached an agreement with the community of Adak to compensate the community for the loss of tax revenues should the landings be redirected to another location.
- (2) The Council advance for analysis an amendment to the crab program that would provide an exemption from the West region landing requirement, in the event that qualifying interested parties agree that no processing capacity is available to support those landings.

This paper discusses both requests. The paper begins with a background section, intended to inform the Council concerning the conditions in the fishery in the first four years of the program. The paper then goes on to discuss the request for an emergency rule, with specific attention to the situation in Adak, as well as, some discussion of other possible processing opportunities in the West region. The paper presents the criteria for use of emergency rules and the effect of a Council votes in support of such a rule. The last section of the paper outlines possible elements for an amendment that would allow for exemption based on the application of interested parties, as suggested by participants in the fishery.

Based on this paper the Council could choose whether to support the request for use of an emergency rule exempting the IFQ and IPQ holders from West region landing requirements for this year. The Council could also choose to advance an amendment for analysis that would establish criteria under which interested parties may apply for an exemption on an ongoing basis. This amendment would be intended to

allow the regional exemption should processing capacity be unavailable in the West region in future years.

Background

Prior to implementation of the rationalization program, the crab fisheries were managed under the License Limitation Program (LLP). Under that program, 28 licenses carried endorsements authorizing participation in the Aleutian Islands golden king crab fisheries (including the Western fishery). Despite a relatively constant TAC leading up to implementation of the rationalization program, the license limits were not constraining and the fishery did not attract the level of competition of other crab fisheries (see Table 1). The fishery's small TAC and distant and relatively limited grounds are believed to have been an effective deterrent to entry to those qualified under the LLP.

Table 1. TACs, catches, and participation by operation type in the Western Aleutian Islands golden king crab fishery (2000/1 through 2007/8 seasons).

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Season	TAC	Catch	Percent of TAC harvested	Number of vessels		
				catcher vessels	catcher processors	all unique vessels
2000 - 2001	2,700,000	2,902,518	107.5	11	1	12
2001 - 2002	2,700,000	2,693,221	99.7	8	1	9
2002 - 2003	2,700,000	2,605,237	96.5	5	1	6
2003 - 2004	2,700,000	2,637,161	97.7	5	1	6
2004 - 2005	2,700,000	2,639,862	97.8	5	1	6
2005 - 2006	2,430,006	2,382,468	98.0	2	1	3
2006 - 2007	2,430,005	2,002,186	82.4	2	1	3
2007 - 2008	2,430,005	2,246,040	92.4	2	1	3
2008 - 2009	2,551,500	2,252,111	88.3	2	1	8

Sources: ADFG fishtickets and NMFS RAM catch data (for 2005-2006, 2006-2007, 2007-2008, and 2008-2009)

Despite relatively low participation levels in the years leading up to implementation of the rationalization program, the fishery did exhibit signs of increased effort. Seasons progressively shortened in the few years leading up to implementation of the program (see Table 2).

Table 2. Season opening and closings in the Western Aleutian Islands golden king crab fishery (2001/2 through 2004/5 seasons).

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Season	Season opening	Season closing
2001 - 2002	August 15	March 30
2002 - 2003		March 8
2003 - 2004		February 2
2004 - 2005		January 3

Sources: ADFG Annual Management Report.

Under the rationalization program, quota shares were allocated based on historic activity in the fishery. With few participants, initial allocations of QS were very concentrated. Very few QS transfers have been made since the implementation of the program, so QS holdings have remained very concentrated (see Table 3).

Table 3. Quota share holdings by share type, region, and operation type in the Western Aleutian Islands golden king crab fishery (2007-2008).

Share type	Share holdings by region and operation type						Across regions and operation types			
	Region/Catcher processor	QS holders	Percent of pool	Mean holding	Median holding	Maximum holding	QS holders	Mean holding	Median holding	Maximum holding
Owner Quota Shares	Undesignated	12	26.9	2.2	1.0	11.0	15	6.67	1.78	45.73
	West	8	26.9	3.4	1.2	13.5				
	Catcher processor	3	46.2	15.4	0.5	45.7				
Crew Quota Shares	Catcher vessel	7	57.5	8.2	6.3	21.7	8	12.50	7.45	41.74
	Catcher processor	2	42.5	21.3	21.3	41.7				

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

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

The few QS holders in the fishery have used measures provided by the rationalization program to concentrate activity in the fishery beyond that of QS holdings. Exclusive allocations have been organized in harvest cooperatives reducing the fleet to two catcher vessels and a single catcher processor, all of which have fished only cooperative allocations. In the first three years of the program, in excess of 99 percent of the annual IFQ has been allocated to cooperatives that have formed in the fishery. In the first three years, three cooperatives formed; in the fourth year, four cooperatives were formed. Gains arising from IFQ are also suggested by the changes in pot usage, pot lifts, and catch per unit effort in the fishery (see Table 4). In the first three years of the program, the number of registered pots per vessel has increased substantially, but the number of pot lifts in the fishery has fallen. Catch per unit effort has also risen substantially, suggesting that participants' use greater numbers of pots and allowing those pots to soak for longer periods has increased catch rates.

Table 4. Pot usage and catches in the Western Aleutian Islands golden king crab fishery (2000/1 through 2007/8).

Season	Number of pots registered*	Number of pot lifts *	Lifts per registered pot*	Average catch per unit effort (crabs per pot lift)*	Pots per vessel	Pounds per pot
2000 - 2001	8,910	101,239	11.4	7	743	28.7
2001 - 2002	8,491	105,512	12.4	7	943	25.5
2002 - 2003	6,225	78,979	12.7	8	1,038	33.0
2003 - 2004	7,140	66,236	9.3	10	1,190	39.8
2004 - 2005	7,240	56,846	7.9	12	1,207	46.4
2005 - 2006	4,800	27,503	5.7	21	1,600	86.6
2006 - 2007	6,000	22,694	3.8	20	2,000	88.2
2007 - 2008	4,800	25,287	5.3	21	1,600	88.8

Sources: *ADFG Annual Management Report and **fishtickets and **NMFS RAM catch data (for 2005-2006, 2006-2007, and 2007-2008)

As might be expected, since implementation of the program, catcher vessel fishing has been extended over a longer period of time (see Table 5). Substantial time periods between landings (or breaks in fishing) appear to have developed. QS holders in the fishery assert that the large spreads between the first delivery and the last deliveries in the second and third years arise largely from the lack of available processing capacity in the West region. These QS holders assert that landings during the second and third years were delayed because participants relied on the shore plant at Adak to handle processing in the West region of the fishery, rather than establishing alternative platforms to support West region landings. Prolonged negotiations concerning processing arrangements between IPQ holders and the Adak processor are said to have delayed processor availability during those two years.

Table 5. Seasons and deliveries in the Western Aleutian Islands golden king crab fishery (2005/6 through 2007/8).

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Season	Season opening	Date of first delivery	Date of last delivery	Season closing
2005-2006		September 6	March 25	
2006-2007	August 15	September 10	May 6	May 15
2007-2008		September 14	May 21	
2008-2009		September 15	May 12	

Source: RAM IFQ landings data

Throughout this time, the 30 percent processing share use cap has prevented any single plant from processing all of the West region IPQ deliveries. Since the beginning of the current season, the use cap exemption applicable to custom processing has removed this regulatory impediment to a single processor receiving all West region IPQ deliveries. Although the exemption is intended to resolve uncertainties concerning availability of processing capacity in the West region, the request for an emergency is premised on a continuing lack of capacity. That assertion is based on the circumstances surrounding the Adak plant.

Adak Fisheries essentially stopped processing at the plant after the 2009 Federal Pacific cod B season and shortly after the start of the State waters Pacific cod A season (mid-April). The plant is currently in 'hibernation mode,' running off of limited power. In early August 2009, a different company assumed majority ownership of Adak Fisheries, and in early September, Adak Fisheries officially filed for Chapter 11 bankruptcy.¹ The company had several unpaid creditors, totaling several million dollars. The United States Bankruptcy Court for the District of Alaska (the Court) scheduled a hearing for November 9, 2009, in Anchorage, to consider the sale of the Adak plant and related assets to a new company, Adak Seafood, LLC.² The proposed sale would include Adak Fisheries' fish processing equipment and other personal property housed in a building owned by Aleut Enterprises and leased to Adak Fisheries. Adak Seafood, LLC, is a newly-formed Delaware limited liability company affiliated with Drevik International. Kjetil Solberg, former owner of Adak Fisheries, is the majority (51%) owner of the company, and Drevik owns 49%.³ The offer from Adak Seafood is \$488,000, plus assumption of the debtor's entire obligation to its primary creditor, Independence Bank, of approximately \$6.7 million. The sale is to be free and clear of the claims, liens, and interests of all persons receiving notice of the motion, except Independence Bank; and the claims, liens, and interests of all such persons (excluding Independence Bank) shall attach to the sale proceeds to the same extent and in the same order of priority as existed in the underlying property.

On November 5, 2009, Aleut Enterprises, LLC, filed an objection with the Court regarding the proposed sale of Adak Fisheries. Aleut Enterprise's current lease to Adak Fisheries expires on December 31, 2009. Aleut Enterprises objected to the sale on several grounds, asserting, in part, that the terms of the Sale Application cannot be met as the Aleut Enterprises lease was terminated pre-petition. Aleut Enterprises also objected to the sale on the grounds that the lease will expire on December 31, 2009 and that the deadline for extending the lease has passed.⁴

¹Source: Seafoodnews.com.

²Case No. 09-00623 DMD, United States Bankruptcy Court for the District of Alaska, October 9, 2009.

³Testimony by Drevik at November 10, 2009, hearing on Case No. 09-00623 DMD.

⁴Aleut Enterprises, LLC's Objection to Debtor's Motion to Sell Adak Fish Plant, Case No. 09-00623 HAR, U.S. Bankruptcy Court for the District of Alaska, November 5, 2009.

The hearing for the sale of Adak Fisheries' assets was held on November 9 - 10, and on November 10, 2009, the Court approved the sale to Adak Seafood, LLC with the original terms of the offer, and including other provisions. Please reference the order in entirety for details (**Item D-1(d)(1)**).⁵ One provision requires that at closing, Adak Seafood shall pay \$250,000 to Aleut Enterprises, LLC, for rent due in 2009 and property damage. Adak Seafood is also required to escrow \$150,000, which is supposed to represent six months of the minimum annual rent due to Aleut Enterprises for 2010. In addition, Adak Seafood is required to pay \$13,000 to the City of Adak to satisfy sales tax obligations. Aside from the primary creditor (Independence Bank), there are several other entities whose claims and liens do not attach to the sale. These include but are not limited to the IRS, State of Alaska, the City of Adak, and Pentech Leasing.⁶ Overall, Adak Fisheries was several millions in debt, and all but a little over \$7 million was removed through the bankruptcy proceedings, as the new company (Adak Seafood LLC) will assume the \$6.7 million owed to Independence Bank. The total sale, including the debt to Independence Bank and other various expenses, was about \$8 million. The order granting the sale notes that the only other offer or expression of interest in the plant was by Trident Seafoods Corporation, which expressed an interest in purchasing certain assets, and after adjustment for differences between two offers (Adak Seafood and Trident Seafoods), Adak Seafood's offer was millions of dollars higher. Trident Seafoods offered \$2 million for the assets of Adak Fisheries, and its offer did not include assumption of the \$6.7 million of debt owed to Independence Bank.⁷

Under the order, the terms of the lease of the building, from Aleut Enterprises to the new owner, Adak Seafood, stay the same. Under its terms, the current lease expires on December 31, 2009. In October, Independence Bank filed a complaint in Bankruptcy Court requesting an injunction to compel Adak Fisheries to exercise an extension of the lease and Aleut Enterprises to accept that extension.⁸ Because the sale order specifically states that all parties reserve all rights with respect to the lease, the complaint is still before the Court. Thus, the parties must negotiate a lease for 2010 and beyond, or litigate the issue to conclusion. Given these circumstances, it remains uncertain whether a shorebased plant will be operational in Adak in the near or long-term future.

Although the disposition of the bankruptcy of Adak Fisheries has contributed to uncertainties concerning processing capacity in the West region, processing capacity in the West region has been an issue since the opening of the fishery. In the first year of the program the Adak plant and a floating processor accepted deliveries in the West region. Since then, no plant other than the Adak plant has received West region deliveries of crab. Harvesters have asserted that they have been prevented from planning fishing, as negotiations between the Adak plant operator and IPQ holders have lasted well into the season. Harvesters also did not fully harvest the IFQ in the fishery in the second, third, or fourth years of the program, arguably because of the processor share use cap constraining processing at the Adak plant and a lack of any other available processing capacity in the West region. Notwithstanding these circumstances, it is not clear that the IFQ holders have used tools provided by the program that could assist them.

No binding arbitration actions have taken place in the fishery in the first four years of the program. In the current season, IFQ holders are believed to have maintained their right to arbitrate under the lengthy season approach, but have not initiated any proceedings to date. Some harvesters have suggested that they have avoided use of the arbitration system because they believe it will be ineffective and could hurt their

⁵Order Granting Debtor's Application to Sell Adak Plant Free and Clear of Liens, Case No. 09-00623 DMD, U.S. Bankruptcy Court for the District of Alaska, November 10, 2009.

⁶Pentech Financial Services, Inc., is the successor company to Pentek Leasing, which is a general equipment lessor for small and mid-ticket equipment.

⁷Memorandum Regarding Potential Acquisition, No. 09-00623 DMD, U.S. Bankruptcy Court for the District of Alaska, November 5, 2009.

⁸Independence Bank v. Adak Fisheries, LLC, et al., Adversary Proceeding No. 09-90031, filed October 15, 2009.

positions in the fishery. These participants believe that the adversarial nature of arbitration proceedings could damage relationships between the sectors in the fishery. While it is clear that the system is adversarial and might stress relationships, it is unclear whether use of the system would damage relationships as contended. The system has been used effectively in other fisheries. While it has stressed relationships among participants at times, it is not believed to have had long term detrimental effects on those relationships beyond those that have arisen in other delivery disputes. In actuality, the use of the arbitration system in those other fisheries might be argued to have had a positive effect on relationships, since it has clarified expectations. In addition, it is asserted that the arbitration system may be ineffective because IPQ holders have used custom processing relationships to process landings in the region. It is clear that an arbitrator is likely to have no authority to compel a plant processing under a custom processing relationship to accept any delivery. The arbitrator is also unlikely to have authority to compel an IPQ holder to accept a delivery. Regardless of who is engaged in the physical processing of the delivery, the arbitrator's only authority is to establish a contract that binds both the IFQ holder and IPQ holder. Any failure to comply with that contract would be enforceable only through a civil action. So, an IPQ holder's failure to perform could be grounds for damages against that IPQ holder. Although the IFQ holder would have no action against the plant processing under the custom processing arrangement, it is unclear how the IFQ holder is disadvantaged, since the suit could be pursued against the IPQ holder. In addition, given the prevalence of custom processing in all fisheries under the program, it is unclear how this differs from the circumstances in any other fishery. In those other fisheries, the arbitration system has effectively protected IFQ holder interests.

Use of an Emergency Rule

Section 305(c) of the Magnuson Stevens Fishery Conservation and Management Act provides authority for rule making to address an emergency or overfishing in a fishery. Under that section, the Secretary, on finding an emergency, may promulgate regulations necessary to address the emergency. Alternatively, if a Council finds an emergency exists and requests action by the Secretary by unanimous vote, the Secretary is required to promulgate rules necessary to address the emergency. A less than unanimous finding by a Council leaves it within the discretion of the Secretary of whether to take action to address the emergency.

In pursuance of this statutory authority, NOAA Fisheries issued policy guidelines to provide guidance to Regional Administrators and Councils in the development and approval of regulations to address emergencies (see NFMS Instruction 01-101-07 and 62 Federal Register 444421-2). The guidelines point out that the only prerequisite for acting is that an emergency must exist. The authority is available for several types of emergencies, including conservation, biological, economic, social, and health emergencies. Emergency rule making is intended for circumstances that are "extremely urgent" where "substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures." The guidance cautions that, "[c]ontroversial actions with serious economic effects, except under extraordinary circumstances should be undertaken through normal notice-and-comment rulemaking." In addition, NMFS "must have an administrative record justifying the emergency regulatory action and demonstrating its compliance with the national standards." To further clarify the scope of emergencies to which this authority applies, the guidance defines an emergency as "a situation that:

- 1) results from recent, unforeseen events or recently discovered circumstances;
- 2) presents serious conservation or management problems in the fishery; and
- 3) can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rule making process."

In addition, the guidance provides that emergency action might be justified, if, in the time that it would take to complete notice-and-comment rulemaking, damage or loss to industry participants or communities would result. Specifically, emergency rule action might be justified for economic reasons:

“to prevent significant direct economic loss or to preserve a significant economic opportunity that otherwise might be foregone.”

Any recommendation of the Council that an emergency rule be adopted should be supported by rationale meeting all three of these criteria.

To meet the first criterion, the emergency must result from recent, unforeseen events or recently discovered circumstances. At first blush, the circumstances at the Adak plant may not appear to meet this criterion. In the last few seasons, IFQ holders and IPQ holders have periodically requested that the Council intervene, as the share cap in the absence of the exemption prevented processing of the entire West region allocation at the Adak plant. In addition, the negotiation of deliveries with the Adak shore based facility were protracted and contentious, leading participants in both sectors uncertain of whether landings could be arranged prior to the season closing. Throughout this time, rumors concerning unpaid obligations led participants to question the financial stability of the plant. Despite these uncertainties, the plant ultimately accepted deliveries from the fishery in each of the first four seasons of the program. The recent bankruptcy proceeding may introduce new concerns surrounding the ability of the Adak plant to accept deliveries in the upcoming season. Should the Council wish to recommend emergency rulemaking to exempt landings from the West region landing requirement, it should build a record establishing the circumstances at Adak as recent and unforeseen or recently discovered.

The second criterion is satisfied, if the situation presents a serious conservation or management problems in the fishery. The record concerning any management problem should identify the event causing the management problem (assumedly the Adak bankruptcy) and why a seemingly private business circumstance is a management problem. In addition, the Council should articulate how the exemption from the West region delivery requirement addresses that management problem in the fishery. The Council should also explain inadequacies of actions other than emergency rulemaking for addressing the problem (such as why contracting a crab floating processor or catcher processor active in the crab fisheries is infeasible).

The third criterion requires that the benefits of emergency rulemaking removing the West region landing requirement outweighs the benefits of advance notice, public comment, and deliberative consideration of the normal rulemaking process. Specifically, the Council should detail tradeoff between the benefits of immediate relief to IFQ holders, IPQ holders, and communities relative to the value of providing greater opportunity for public comment and deliberations. Only if benefits to fishery participants and communities exceed the value of the more deliberative normal rulemaking process should emergency rulemaking be requested.

Even meeting these criteria, the Council should also build a record that identifies these circumstances as an “emergency”. The circumstances must be “extremely urgent” where “substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures.” This substantial harm or disruption should be explicitly described. The Council should also discuss whether fishery participants could make alternative arrangements for West region deliveries prior to the end of the season to overcome the harm or disruption. The Council should also

describe why this action is not a controversial action with serious economic effects (including potential effects on any potential future operator of the Adak plant).

Previous emergency rules were approved to address sudden changes in the fishery that did not provide time to implement the regulations with advance notice and public comment to address the fishery conservation concern or the specific legislative mandate. Since 1994, NMFS Alaska Region has implemented 36 emergency rules. Twenty four of these were emergency regulations, extensions of previously published emergency regulations, or corrections to previously published regulations specifically addressing Steller sea lion management measures. The justification for these emergency regulations included avoiding the likelihood of jeopardizing the continued existence of the western population of Steller sea lions and addressing adverse effects on critical habitat based on a biological opinion published in December 1998, shortly before the start of the 1999 fishing season (January 22, 1999, 64 FR 3438), responding to a court order remanding from the Western District of Washington remanding Steller sea lion reasonable and prudent alternatives (January 25, 2000, 65 FR 3892)). Ten emergency regulations specifically addressed issues related to the implementation of the AFA, most in direct response to the passage of legislation mandating that specific measures in the AFA be implemented prior to the start of a fishing season (January 26, 1999, 64 FR 3877). One emergency rule was published to address unanticipated fishing practices that resulted in the overharvest of scallops (60 FR 11054). And, one emergency rule was adopted to address non-chinook salmon bycatch levels in the Bering Sea and Aleutian Islands that substantially exceed previous two years' bycatch levels (July 12, 1994, 59 FR 35476). NMFS Alaska Region has not previously approved emergency rules based on an unharvested allocation or operational difficulties affecting a specific processing or harvesting entities or community or regional interests.⁹

Development of an exemption from West region landing requirements

In addition to emergency rulemaking, interested parties (including both fishery participants and community representatives) have requested that the Council proceed with an amendment package to address possible future capacity issues in the region. At the October 2009 meeting, these parties presented the Council with a draft proposal that could be used to establish the exemption (see Appendix A). If the Council elects to advance this action, it could adopt the provisions suggested by the proposal for analysis, supplemented with additional options as it believes appropriate.

In developing alternatives defining the exemption, the Council should consider that NOAA Fisheries administration of regulations that require time sensitive fact-based findings can be problematic. Typically, these determinations require not only extensive agency efforts to verify facts, but also administrative determinations and, if contested, an appeals process. Time sensitive determinations, such as findings of the absence of available processing capacity needed for approving this exemption may not be expeditiously administered by the agency.

Recognizing the potential burden of agency fact-based determinations, proponents of the exemption suggest an exemption that is administered by interested parties in the fishery. The proposal would allow for identified parties, including certain QS holders, PQS holders, shoreside processors, and municipalities to contractually agree to the exemption on an annual (or biennial) basis. Specifically, the proposal suggests that the exemption would require the consent and agreement of:

⁹ In the event the Council elects to recommend emergency rulemaking, the Council should consider that the rule may remain in effect for a period of not more than 180 days. Any extension may not exceed 186 days and requires public comment on the rule and that the Council advance an action to address the emergency in the long term.

- 1) all QS holders with holdings in excess of a minimum threshold (e.g., 10 percent of the West region QS pool),
- 2) PQS holders with holdings in excess of a minimum threshold (e.g., 10 percent of the West region PQS pool),
- 3) any shoreside processor that processed in excess of a minimum threshold of West region IPQ landings in the preceding year, and
- 4) the communities of Adak and Atka.¹⁰

As proposed, the exemption would apply if the parties agree that no shoreside processing plant would be available for the processing of crab in the region for the season.¹¹ This requirement could lead to complications in administration of the exemption, particularly if a person (including one not required to be a party to the agreement) contends that processing capacity is available in the region. Such an assertion could require a NOAA Fisheries finding of the absence of an available West region processing plant, which may be difficult to establish. If the Council believes that all relevant interests are represented by the identified parties to the agreement, it could simply allow the parties to establish the exemption on an annual basis by agreement. An alternative could be to simply require that the required parties all agree to the exemption, in which case NOAA Fisheries would grant the exemption.

A few options are suggested for the timing of determinations. Under one, the exemption could be applied for, if the parties agree that a plant will not be available prior to a date certain (December 1st is suggested in the proposal). Under an option, the exemption would expire, if a plant were to open later in the season. An option could also require IFQ holders to use undesignated IFQ prior to using West region IFQ to increase the opportunity for operations in the West region. These types of factual determinations could pose challenges for administration, particularly if contested.

The proposal also includes an option for a two year exemption on agreement of the parties. Although this option may simplify administration, it is possible that it could delay the development of processing capacity in the West region, if a processor would open a plant in the second year of an exemption.

An option for community compensation could be included in the agreement. As suggested, the compensation would be a percentage of the ex vessel revenues from the landing. These are intended to allow for a limited, but effective, exemption to the regional landing requirement when processing capacity is unavailable in the West region. Although this provision could be important to protection of community interests, the provision for compensation might be best negotiated by the parties, as NOAA Fisheries authority for imposing these costs on fishery participants could be questioned.

While the suggested options could be used to tailor the exemption to limited circumstances, those provisions may also affect the ability of NOAA Fisheries to administer the exemption. Specifically, any provision that is available only if no processing capacity is available may require NOAA Fisheries to make an evidentiary finding concerning processing capacity. Such an agency finding is unlikely to be feasible inseason, as such factual determinations would require NOAA Fisheries to monitor the

¹⁰ As presented to the Council initially (and in the appendix) these communities only qualify, if they supported processing in the preceding year. Testimony of proponents suggested that the communities would always be required to be a party to the contract.

¹¹ If the Council elects to maintain a requirement that no processing capacity be available in the region for the exemption to be merited, it should consider whether the presence of floating processing capacity should affect the exemption. In its recent action concerning processor share use caps, the Council elected to exempt from the use cap custom processing at a floating processor docked in a community and custom processing any floating processor in the community of Atka.

availability of processing capacity in the area and provide opportunities for appeals of any person contesting that determination. Given the To streamline administration of the exemption, the Council could consider a provision that would use clear criteria for identifying any required parties to an agreement to the exemption and allow those parties to establish the exemption by agreement. On filing a notice with NOAA Fisheries, the exemption would be established for a fixed period (such as a season).

Although this may be the only administrable measure for establishing an exemption, several risks could arise from this approach. For such a provision to be effective, the parties to the contract would need to be reasonable in their determination of whether to consent to the exemption. To prevent a party from denying the exemption when it might be merited, a provision that requires that parties not unreasonably withhold consent to the exemption is suggested by the industry proposal. Yet, NOAA Fisheries would likely be required to adjudicate any dispute concerning a party's denial of the exemption, which may make the exemption ineffective any time a dispute arises. Given that the exemption would likely be ineffective, if a party disputes whether it is merited, it is likely that are provision that requires that parties not unreasonably withhold consent will be ineffective. A straight forward provision simply requiring that the exemption apply only with the consent of all defined interested parties would be as effective and avoid administrative disputes that cannot be completed in a timely manner.

Applying the exemption on the agreement of the parties also creates a risk that parties might agree to the exemption when it is not merited. For example, if processing capacity were available in the West region, it is possible that the designated parties to the agreement might arrange for an exemption, if they would prefer not to use the available processing platform. This could occur if the platform is not associated with one of the identified communities, the IFQ holders and IPQ holders elect not to use the available processor, and its owner does not hold PQS needed to qualify as a party to the exemption agreement.

If the Council wishes to pursue this action, it could use the proposal from the October meeting as a starting point for alternatives. Possible options could include:

- 1) various share holdings thresholds for defining interested parties;
- 2) including as options terms that require additional agency oversight of the exemption (i.e., those that define specific circumstances when the exemption applies), including:
 - a. provisions defining the circumstances justifying the exemption,
 - b. provisions defining when the exemption could be removed mid-season, and
 - c. provisions defining compensation.

The minimum provision could simply define the parties to the exemption agreement, allowing those parties full discretion to file for the exemption. The exemption would be effective on filing an affidavit with NOAA Fisheries signed by all parties confirming that the parties have agreed to the exemption. Using this approach, the Council could define a range of alternatives for analysis, each of which can be examined to assess the feasibility and effectiveness of the proposed exemption.

APPENDIX A

Emergency Relief Proposal For WAG Landing Requirement**Purpose and Need Statement:**

The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude, in the event that no shoreside processing facility is open to take delivery and process WAG IFQ. In that circumstance, the regional landing requirement needs to be relaxed to allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.

Alternative 1: Status Quo**Alternative 2: Contractually Defined Exemption**

To receive an exemption from the regional landing requirement in the WAG fishery, specified QS holders, PQS holders, shoreside processors, and municipalities, shall have entered into a contract prior to the date on which the exemption is sought. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed. In the affidavit, the parties shall affirm that the contract includes conditions under which an exemption may be granted, any mitigation requirements and the terms of any compensation.

Definitions:

QS Holders: Any person or company that holds in excess of 20 percent of the west-designated WAG QS.

PQS Holders: Any person or company that holds in excess of a 20 percent of the west-designated WAG PQS.

Shoreside Processors: A shoreside processing facility that is located in one of the defined municipalities and that processed in excess of 20 percent of the west-designated WAG IFQ in the preceding fishing year. In the event an exemption is granted in any particular crab fishing year, the eligibility designation for the municipality shall continue in force until at least one crab fishing season has been completed with no exemption from the regional landing requirement having been granted.

Municipalities: The municipalities of Adak and/or Atka, provided that at least 20 percent of the west-designated WAG IFQ was processed in the municipality in the crab fishing year immediately preceding the current crab fishing year. In the event an exemption is granted in any particular crab fishing year, the eligibility designation for the municipality shall continue in force until at least one crab fishing season has been completed with no exemption from the regional landing requirement having been granted.

Types of Exemptions:**Option 1) Short Term Exemption**

A short term exemption to the regional landing requirement may be granted in the event there is no shoreside processing facility available to process west-designated WAG in the region during the crab harvesting season. In granting such exemption, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing, which shall not be unreasonably withheld.

Suboption a) A short term exemption is available if a shoreside processing plant will not open before December 1 of the WAG season.

Suboption b) If a shoreside processing plant opens after December 1, and west-designated IFQ is still available, the exemption from the regional landing requirement shall expire.

Suboption b-i) Holders of WAG IFQ shall deliver their undesignated IFQ prior to delivering their west-designated IFQ.

Suboption b-ii) No required IFQ delivery sequence.

Option 2) Long Term Exemption

A long term exemption to the regional landing requirement may be granted in the event there is no shoreside processing facility available to process west-designated WAG in the region for a period of one or more years. In granting such exemption, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing, which shall not unreasonably be withheld. A long term exemption may not be longer than two years, although it may be renewed by affirmative action, in writing, of the parties as defined above.

Compensation:

Option 1) No compensation.

Option 2) In the event an exemption of any type is granted for any reason, the QS holder and PQS holder shall pay an eligible municipalit(ies) a specified percentage of the total ex-vessel value of the west-designated WAG IFQ landed outside the region. The QS holder and PQS holder shall each be liable for paying 50 percent of the compensation. Compensation funds will be distributed to the municipalit(ies) based on each municipality's pro rata share of the west-designated WAG IFQ that was processed in the municipality the preceding crab fishing year.

Arbitration:

A contract party's refusal to approve granting an exemption from the regional landing requirement is subject to binding arbitration. If the arbitrator finds that the contract party unreasonably withheld its approval of an exemption, the arbitrator may order that requirement for the party's approval be waived and the exemption be granted, provided that all other requirements for an exemption are satisfied.