

APPENDIX 2

- 1) **COUNCIL REPORT TO CONGRESS ON BSAI CRAB RATIONALIZATION ALTERNATIVES, AUGUST 2, 2002.**
- 2) **COUNCIL UPDATE TO CONGRESS ON BSAI CRAB RATIONALIZATION PROGRAM, MAY 6, 2003.**
- 3) **CONGRESSIONAL RESEARCH SERVICE MEMORANDUM TO HONORABLE PATTY MURRAY, JULY 16, 2002.**
- 4) **COUNCIL LETTER TO U.S. DEPARTMENT OF JUSTICE, ANTI-TRUST DIVISION, APRIL 29, 2003.**
- 5) **U.S. DEPARTMENT OF JUSTICE, ANTI-TRUST DIVISION LETTER TO GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE, AUGUST 27, 2003.**
- 6) **CONSOLIDATED APPROPRIATIONS ACT 2004 (Pub. Law No. 108-199), § 801.**
- 7) **PASSAGE OF THE FY2004 CONSOLIDATED APPROPRIATIONS CONFERENCE REPORT REGARDING PROVISIONS RELATED TO ALASKAN FISHERIES.**
- 8) **SENATOR STEVENS BERING SEA/ ALEUTIAN ISLANDS CRAB RATIONALIZATION STATEMENT.**

- 1) **COUNCIL REPORT TO CONGRESS ON BSAI CRAB RATIONALIZATION ALTERNATIVES, AUGUST 2, 2002.**

North Pacific Fishery Management Council

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August 5, 2002

Dear Senators and Representatives:

As part of the Consolidated Appropriations Act of 2001 (Pub. L. No. 106-554), Congress directed the Council to examine fisheries under its jurisdiction to determine whether rationalization is needed and provide an analysis of several specific approaches to rationalization. The specific legislative language is:

The North Pacific Fishery Management Council shall examine the fisheries under its jurisdiction, particularly the Gulf of Alaska groundfish and Bering Sea crab fisheries, to determine whether rationalization is needed. In particular, the North Pacific Council shall analyze individual fishing quotas, processor quotas, cooperatives, and quotas held by communities. The analysis should include an economic analysis of the impact of all options on communities and processors as well as the fishing fleets. The North Pacific Council shall present its analysis to the appropriations and authorizing committees of the Senate and House of Representatives in a timely manner.

This letter, and attachments, are intended to provide you with that analysis for the Bering Sea and Aleutian Islands (BSAI) crab fisheries, and inform you of our Council's recent actions in this regard. The Council recently completed an analysis of rationalization alternatives for the BSAI crab fisheries as requested by Congress. Relying on this analysis, the Council has concluded that these fisheries, their participants, and dependent communities would benefit from rationalization. Rationalization will improve economic conditions substantially, for all sectors of the crab industry. Community concerns and the need to provide for economic protections for hired crew will be addressed. Safety in the fisheries will be enhanced. Biological benefits will also be realized. At its June 2002 meeting, the Council, by a unanimous 11-0 vote, identified a specific rationalization program as its preferred alternative for rationalization of the BSAI fisheries. This vote followed three years of meetings and discussion by industry sectors involved in these fisheries, two years of discussion and development by the Council and its industry Advisory Panel, and nearly two years of detailed analyses by Council staff, with assistance from NMFS, ADF&G, and independent economists and fisheries consultants.

The preferred alternative, a "three-pie voluntary cooperative program", is a carefully crafted program that balances the interests of several identifiable groups that depend on these fisheries. Allocations of harvest shares would be made to harvesters, communities, and captains. Processors would be allocated processing shares. Designated regions would be allocated landings and processing activity to preserve their historic interests in the fisheries. Harvesters would be permitted to form cooperatives to realize efficiencies through fleet coordination. The novelty of the program has compelled the Council to include several safeguards into the program, including a binding arbitration program for the resolution of price disputes and extensive data collection and review programs to assess the success of the rationalization program. These safeguards, together with the Council's continuing development of the program through a series of ongoing amendments and clarifications, demonstrate the Council's commitment to a fair and equitable rationalization program, which will protect the interests of those that depend on the BSAI crab fisheries.

I have enclosed the Council's report summarizing the preferred rationalization alternative, as well as a complete copy of the detailed analyses. I have included extra copies of the summary document for your convenience. I believe our summary report and the detailed analyses demonstrate that the Council has thoroughly assessed the impacts of rationalization on these fisheries, their participants, and dependent communities. We believe that the rationalization program will benefit all of those groups and presents a significant opportunity to improve biological and economic conditions and safety in these fisheries. Implementation of this program would follow its final approval through the Environmental Impact Statement (EIS) currently being prepared for the crab FMP, which we expect to be completed for Council action early next year. Congressional authorization for this program would, of course, also be necessary.

This program is certainly not without its controversy. The adoption by the Council of processing quota shares as a fundamental part of the program is probably the most controversial aspect of the program. However, the Council believes, as reflected in its unanimous vote, that the crab fisheries in the Bering Sea/Aleutian Islands require this innovative, comprehensive management approach to adequately recognize and protect the interests of all participants. It recognizes all components of the fishery as a balanced, inextricably linked system, rather than individual, competing components. It may not be the appropriate model for other fisheries in the Nation, or even for other fisheries in the North Pacific, and is not intended to be a template for other fisheries. We do believe it is the appropriate management approach for this fishery, and we respectfully submit that Congress should allow for such regionally tailored approaches in the management process. All Councils need such flexibility as we consider development of rationalization programs for other fisheries, for the benefit of all user groups and to sustain our precious fisheries resources for the Nation.

I hope the enclosed information is useful to the United States Congress as you consider reauthorization of the Magnuson-Stevens Act, or consider other legislation affecting our fisheries. Please contact our Council, through the office of the Executive Director, if you require further information.

Sincerely,

A handwritten signature in black ink, appearing to read "David Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Benton
Chairman

EXECUTIVE SUMMARY

Bering Sea and Aleutian Islands Crab Rationalization Program

In recent years, substantial investments of participants in the Bering Sea/Aleutian Islands (BSAI) crab fisheries, together with stock declines, have resulted in a race for fish, complicating stock management and causing economic hardship. For several years, the North Pacific Fishery Management Council (the Council) has worked with participants to address these problems through series of working groups and management measures. In 2001, Congress directed the Council to conduct an analysis of several different approaches to rationalizing the BSAI crab fisheries, some of which are beyond the current authority of the Council, such as individual fishing quotas, processor quotas, cooperatives, and quotas held by communities. Over the course of the last year the Council conducted a comprehensive analysis of rationalization alternatives. At its June 2002 meeting, the Council, by unanimous vote, selected a preferred rationalization alternative, a “voluntary three pie cooperative,” from the several alternatives considered. The Council developed the program to address the particular needs of the BSAI crab fisheries. The primary elements of the program are:

- **Harvest shares** will be allocated for 100 percent of the total allowable catch (TAC).
- **Processing shares** will be allocated for 90 percent of the TAC.
- **Regional share designations** will apply to processor allocations and the corresponding 90 percent of the harvest allocations distributing landings and processing between specific regions.
- A **mandatory binding arbitration** program will be used to settle price disputes between harvesters and processors.
- **Voluntary harvester cooperatives** would be permitted to achieve efficiencies through the coordination of harvest activities and deliveries to processors.
- **Community Development Quota allocations** will be increased from 7.5 percent to 10 percent of the TAC.
- **Captain share allocation** of 3 percent of the TAC for exclusive use by captains and crew.
- A **crew loan program** to assist crewmember entry to the fisheries.
- **Comprehensive data collection and program review** to assess the success of the rationalization program.

Complete allocation of the total allowable catch (TAC) adds precision to stock management beyond that possible in a competitive, race for fish. The separate allocations to harvesters and processors are intended to protect the historic distribution of activities in each sector and mitigate the negative effects of the transition from competitive to rationalized fisheries. The competing interests of harvesters and processors are balanced by allocating different portions of the total harvest to the two sectors. The binding arbitration program is included to further ensure a fair distribution of returns from the fisheries to both sectors. The regional landing and processing requirements protect regional dependence that has developed in the current fishery. Community Development Quota allocations are harvest allocations to groups representing rural Western Alaska communities to facilitate fishing activity and economic development in those areas. Increasing these allocations demonstrate the Council’s commitment to economic development of the geographically isolated areas of Western Alaska. The allocation of shares to captains is intended to protect the interests of captains and crew in the fisheries, which can change as a result of rationalization.

The novelty of the program has compelled the Council to include several safeguards in the program, including extensive data collection and review programs to assess the success of the rationalization program. These safeguards, together with the Council’s continuing development of the program through a series of ongoing amendments and clarifications, demonstrate the Council’s commitment to a fair and equitable rationalization program, which will protect the interests of all sectors that depend on the BSAI crab fisheries.

**Summary of the North Pacific Fishery Management Council's
Bering Sea and Aleutian Islands Crab Rationalization Program
Submitted to the United States Congress, August 2002**

Since their inception, Bering Sea/Aleutian Islands (BSAI) crab fisheries of the North Pacific have attracted participants willing to undertake the financial and personal risks necessary to participate. In recent years, the substantial investments of participants, together with stock declines, have resulted in a race for fish in these fisheries. The shortest fishery is typically prosecuted during a 3 or 4 day season each year. Efforts of managers to protect declining stocks by reducing allowable catch have increased the economic stress on participants and communities that depend on these fisheries and increased pressure on participants to take greater risks. For several years, the North Pacific Fishery Management Council (the Council) has worked with participants to address these problems through series of working groups and management measures. In 2001, Congress directed the Council to conduct an analysis of several different approaches to rationalizing the BSAI crab fisheries, some of which are beyond the current authority of the Council, such as individual fishing quotas, processor quotas, cooperatives, and quotas held by communities.¹ Over the course of the last year the Council conducted a comprehensive analysis of rationalization alternatives. At its June 2002 meeting, the Council, by unanimous vote, selected a preferred rationalization alternative from the several alternatives considered. The Council developed the rationalization program to fit the specific dynamics and needs of the BSAI crab fisheries. The program builds on the Council's experiences with the halibut and sablefish IFQ program and the American Fisheries Act cooperative program for Bering Sea pollock. The program addresses conservation and management issues associated with the current derby fishery and would reduce bycatch and associated mortalities. Share allocations to harvesters and processors, together with incentives for cooperation, would increase efficiencies, provide economic stability, and facilitate compensated reduction of excess capacities in both harvesting and processing sectors. A binding arbitration program will be incorporated into the program developed to resolve price disputes between harvesters and processors, which in the past have delayed fishing. Community interests are protected by Community Development Quota (CDQ)² group allocations and regional landing and processing requirements. Captains are allocated a portion of the catch to protect their interests in the fisheries. The program includes a comprehensive socioeconomic data collection program that would aid the Council in assessing the success of the program and developing amendments necessary to mitigate any unintended consequences. Perhaps most importantly, the program would improve safety of participants in the fishery by ending the race for fish. The Council's motion defining the rationalization program is attached hereto as Appendix A. The complete Council analysis is attached as Appendix B. This document summarizes the results of the analysis and describes in detail the Council's preferred alternative and the potential effects of the preferred alternative on the fisheries and participating harvesters, processors, and communities.

The Council set out to develop a program that addresses several concerns in the BSAI crab fisheries. The problem statement developed by the Council highlights resource conservation, bycatch, excess harvesting and processing capacity, lack of economic stability for harvesters, processors, and coastal communities, and occupational safety as primary issues to be addressed by the rationalization program. Harvests and revenues from the fisheries suggest some of the economic problems facing the participants. Figure 1 shows the harvest pounds and gross revenues for all fisheries proposed for rationalization between 1991 and 2000. The figure shows that the revenues from harvests in 2000 (the most recent season for which data are available) are one third of the harvest revenues in 1991. The figure also shows significant fluctuations in both pounds harvested and revenues. Fluctuations in harvest levels and revenues do not coincide for a few reasons. Prices for some species have varied by as much as three-fold across years. The values of different species also differ

¹ The specific direction appears in the Consolidated Appropriations Act of 2001 (Pub. L. No. 106-554).

² Under the CDQ program, harvest allocations are made to groups representing rural Western Alaska communities to facilitate fishing activity and economic development in those areas.

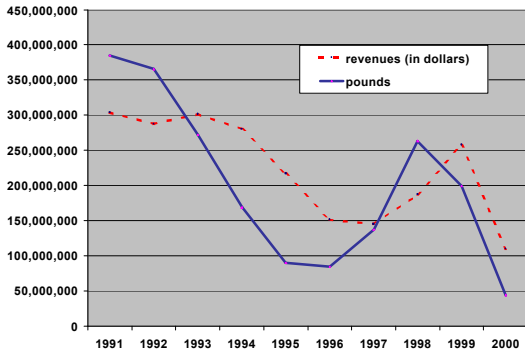


Figure 1 Harvest revenues and pounds from Bering Sea and Aleutian Islands Crab Fisheries Proposed for Rationalization
Source: NPFMC Crab Rationalization Database 2001, Version 1

substantially, with red king crab bringing the highest price and *C. opilio* bringing the lowest price. The Council examined these issues in the context of the BSAI crab fisheries, analyzing the biological and environmental conditions in the fisheries, participation patterns in the harvesting and processing sectors, and the relative dependence of those sectors and communities on the fisheries. Using the analysis, the Council developed a preferred program uniquely suited to the conditions in the BSAI crab fisheries.³ Because the program is a substantial change from current management of the fisheries and is unique in fisheries management, the Council has incorporated several safeguards into the program to mitigate possible negative impacts. In addition, the Council has developed a comprehensive data collection program and a rigorous program review process to allow the Council to

evaluate the success of the program and make any modifications necessary to prevent unintended negative consequences.

Summary of the Preferred Rationalization Program

The Council identified as its preferred alternative a “voluntary three pie cooperative” program. The program makes three separate allocations, one to the harvest sector, one to the processing sector, and one to defined regions. All three allocations are based on historic participation to protect investment in and reliance on the fisheries. To ensure protection of historic activities, the form of each allocation is the activity which the recipient participates in and relies on. Harvesters will receive harvest allocations, processors will receive processing allocations, and regions will receive allocations of landings and processing activity. These three separate allocations are also intended to mitigate the negative effects of the transition from competitive to rationalized fisheries.

The competing interests of harvesters and processors are balanced by allocating different portions of the total harvest to the two sectors. Harvesters will be allocated harvest shares for 100 percent of the total allowable catch (TAC). Processors will be allocated processing shares for 90 percent of the TAC. To ensure corresponding allocations to the two sectors, 90 percent of the harvest allocation is allocated as “Class A” shares that require delivery to a processor that holds processing shares. The remaining 10 percent will be “Class B” shares that can be delivered to any processor. Under the program, harvesters would be permitted to form cooperatives to achieve efficiencies through the coordination of harvest activities and deliveries to processors.

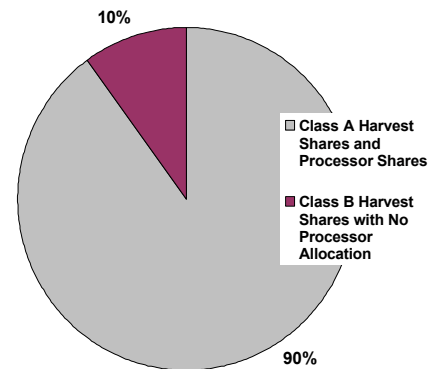


Figure 2 Allocation of harvest shares and corresponding processor shares

To further ensure a fair distribution of returns from the fisheries to both sectors, the program will include a mandatory binding arbitration program for the settlement of price disputes between harvesters and processors. Historically, prices have been settled by harvester strikes, which can be detrimental to both sectors. An effective system of binding arbitration could protect the interests of both sectors in negotiations while avoiding costly delays in fishing due to strikes.

³ The suitability of the Council’s preferred program for management of the BSAI crab fisheries is not an endorsement of the program for management of other U.S. fisheries (or even other fisheries in the North Pacific). The Council firmly believes that management of a fishery should be specific to the conditions and circumstances in the fishery.

Primary Components of the Preferred Rationalization Alternative

- Harvesters Allocated 100 percent of the TAC as IFQs
- Processors Allocated 90 percent of the TAC as IPQs
- A voluntary cooperative program to achieve efficiencies through fleet coordination
- Mandatory binding arbitration program for settlement of price disputes
- North/South regionalization of landings and processing to protect communities
- Increase in CDQ allocations from 7.5 percent to 10 percent
- Captain share allocation of 3 percent
- A loan program to assist crewmember entry to the fisheries
- A data collection program and program review to evaluate the

The allocation to regions is accomplished by regionally designating all Class A (delivery restricted) harvest shares and all corresponding processing shares. In most fisheries, regionalized shares are either North or South, with North shares designated for delivery in areas on the Bering Sea north of 56°20' north latitude and South shares designated for any other areas, including Kodiak and other areas on the Gulf of Alaska.⁴ Figure 3 is a map showing 56°20' north

latitude, by which the fisheries would be regionally divided. Share designations are based on the historic location of the landings and processing that gave rise to the shares. The program would also increase the allocation of crab to CDQ groups from 7.5 percent to 10 percent, providing additional aid to communities.

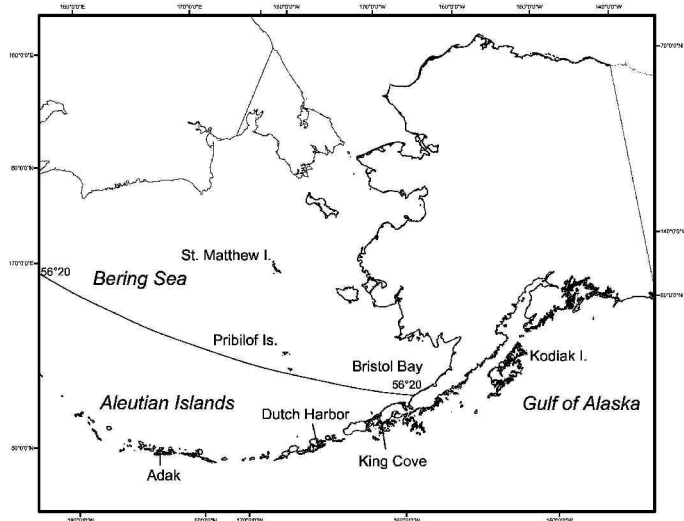


Figure 3 North and south regional designations.

The program also contains several additional measures to protect various interests. Eligible captains will receive 3 percent of the initial allocation of harvest shares. Sideboards would limit the activity of crab vessels in other fisheries (such as the Gulf of Alaska groundfish fisheries) to protect participants in those fisheries from a possible influx of activity that could arise from vessels that exit the crab fisheries or are able to time activities to increase participation in other fisheries.

The Council considered several other rationalization alternatives, including an IFQ program that would allocate harvest shares only, a two pie IFQ program that would allocate harvester shares and processing shares, and several cooperative programs that would allocate shares to harvesters with different levels of

delivery commitments from harvesters to processors. In the estimation of the Council, each of these other alternatives would inadequately protect the interests of historic dependents on the fisheries, neglecting either the interests of an entire group or an identifiable segment of a group.

⁴ In the Western Aleutian Islands (Adak) golden king crab fishery, the designation is based on an east/west line to accommodate a different distribution of activity in that fishery.

The Impacts of Rationalization on Fisheries

The preferred alternative would rationalize all of the large crab fisheries in the BSAI. The following fisheries would be included in the rationalization program:

- Bristol Bay red king crab
- Western Aleutian Islands (Adak) golden king crab - West of 174° W
- Eastern Aleutian Islands (Dutch Harbor) golden king crab - East of 174° W
- Western Aleutian Islands (Adak) red king crab - West of 179° W
- Pribilof blue and red king crab
- St. Matthew blue king crab
- Bering Sea *C. opilio* (snow crab)
- Bering Sea *C. bairdi* (Tanner crab)

Since these fisheries are currently managed under the License Limitation Program, harvester entry is limited. Individual harvests, however, are determined by the harvests in competitive race for fish. Since the seasons in most of the fisheries selected for rationalization do not conflict, most participants are active in several of the fisheries, moving from one fishery to another throughout the year. Notwithstanding these opportunistic movements from fishery to fishery, equipment is often idle for several months of the year, suggesting substantial overcapitalization. In addition, several participants report that they are unable to breakeven in the fisheries at current harvest levels. The fisheries to be included in the program are fully developed with their grounds well identified. The full development of the BSAI crab fisheries and the idle equipment and facilities make these fisheries suitable for rationalization. A rationalization program would allocate individual quotas to participants, limiting entry and facilitating an orderly and compensated exit of capacity from the fisheries. Trading of shares within the rationalization program should improve efficiency in the fisheries, as the more efficient participants purchase shares from higher cost producers. In addition, the system of revocable privileges would create a system of allocation, removing the race to fish, yet allowing participants to change participation levels in response to changes in conditions of the fisheries or individual circumstances. The comprehensive nature of the program (i.e., including all of the large BSAI crab fisheries) allows participants to coordinate their activities across all of these fisheries, permitting greater levels of efficiency.

The Bristol Bay red king crab, the Bering Sea *C. opilio*, and the Bering Sea *C. bairdi* fisheries are the largest of the BSAI crab fisheries and have received the most fishing effort. Stock declines in the Bristol Bay red king crab and the Bering Sea *C. opilio* have led to short derby seasons of a few days or weeks suggesting substantial overcapitalization. The Bering Sea *C. bairdi* fishery has been closed for the past several seasons. The

Benefits of the Rationalization Program

Biological Benefits

- Improved stock management through use of a TAC
- Reduced overharvests through individual allocations
- Reduced discards through longer soak times and better sorting of undersized crab by gear
- Improved handling of discards by ending derby fishery

Economic Benefits

- Compensated reductions in capitalization through voluntary share transactions
- Economic stability for the harvesting and processing sectors and communities

Social Benefits

- Preservation of regional distribution of economic activity
- Facilitated entry to the fishery for crew
- Protection of historical interests of captains

Safety Benefit

- Improved safety by ending the derby fishery

Pribilof blue and red king crab⁵ and the St. Matthew blue king crab fisheries have been closed in recent years due to stock declines. When open, these fisheries also received substantial effort, primarily from vessels that also participate in the largest BSAI crab fisheries. The Aleutian Islands golden king crab fisheries have received less effort than most of the other BSAI crab fisheries due to their remote grounds and the need for specialized gear for participation. Participation in these fisheries has increased in recent years and would likely increase further, if they were omitted from the rationalization program. The Western Aleutian Islands (Adak) red king crab fishery has been closed in recent years. Harvest strategies are currently being developed to open this fishery. The fishery is relatively small and would likely experience an influx of capacity, if the fishery were omitted from the rationalization program.⁶

Rationalization should benefit crab stocks and their habitat. The rationalized fisheries would be managed with a total allowable catch (TAC), which sets a specific catch limit, instead of a guideline harvest level (GHL) as is currently used. GHLs set target catch as a range as opposed to a specific target catch set by a TAC. This more precise management of harvests should benefit stocks. In addition, the individual allocations in a rationalized fishery also increase accountability and decrease the chance of overharvests from the fishery. In the current derby fisheries, managers monitor harvests by in season reports and attempt to time the closure of the fishery with completion of the harvest of the GHL. The GHL is often exceeded through no fault of the managers because inseason monitoring cannot keep pace with harvests during the short seasons. To ensure that harvest goals are not exceeded in the rationalized fishery, any overharvest would be forfeited. In addition, penalties would be imposed for any overage in excess of 3 percent of a person's allocation. Individual allocations in a rationalized fishery permit this level of accountability and should ensure that harvest goals are met but not exceeded.

The Council and the State of Alaska⁷ are committed to revising the inseason management appropriately to improve protection of the crab resource under rationalization. Pot limits may be relaxed in a rationalized fishery, allowing pots to soak longer. Longer soak times allow crab pot escape mechanisms to function, reducing harvests and discards of undersized and female crab. Seasons in most fisheries will be extended, with closures to protect crab during molting and mating seasons and possible limits to facilitate monitoring. The monitoring program in the fisheries will be adapted to address potential changes in fishing practices under the rationalization program and improve knowledge of stocks in slower paced fisheries. High grading (or the retention of only the highest value catch) can occur when the benefit of discarding low value catch and replacing it with higher value catch exceeds the cost of reharvesting. Rationalization will remove the time pressures of a derby fishery, which could increase the incentives to high grade, since harvesters would not sacrifice a share of the fishery when discarding catch. Additional monitoring will be necessary to determine the potential for high grading and to enforce regulations developed to minimize detrimental impacts of changes in fishing practices on stocks. Vessel Monitoring Systems and increased observer coverage and shore side monitoring are anticipated under the rationalization program. Additional onboard observer coverage and

⁵ The Pribilof blue and red king crab have been harvested in a combined fishery for several years. Managers protect the two different stocks through area closures and season scheduling. Continued management in the combined fishery is thought to be appropriate to protect the two stocks and to maintain consistency of operations for the current participants.

⁶ A few federal fisheries are excluded from the program, most notably the Norton Sound red king crab fishery, which is operated under a "super exclusive" permit program intended to protect the interests of local, small vessel participants. Under the permit program, participants in the Norton Sound fishery are not permitted to participate in any other BSAI crab fishery minimizing the relationship between this fishery and the overcapacity that has occurred in the other fisheries.

⁷ The BSAI crab fisheries are subject to joint federal and state management with certain elements of oversight, including monitoring, in-season management, and observer coverage deferred to the State of Alaska. The Council contemplates that the joint management relationship would continue in the rationalized fishery.

dockside sampling are needed to determine if changes in fishery selectivity occur. The preferred rationalization program requests that the State of Alaska Department of Fish and Game, the State of Alaska Board of Fisheries and the State of Alaska Board of Fisheries/North Pacific Fishery Management Council Joint Protocol Committee address concerns of discards, highgrading, incidental catch, and the need for bycatch reduction, improved retention, and inseason monitoring under the program. Although resource concerns could arise in a rationalized fishery, the reduction of time pressures creates the opportunity for improving understanding of stocks, discard reductions and improved handling. The Council and the State of Alaska are committed to realizing these opportunities.

The Harvest Sector

Harvesters would be allocated quota shares (QS) in each fishery rationalized by the program. QS are a revocable privilege that allow the holder to receive an annual allocation of a specific portion of the annual TAC from a fishery. These annual allocations are referred to as Individual Fishing Quotas (IFQs). QS will be designated as either catcher vessel shares or catcher/processor shares, depending on whether the vessel that created the privilege to the shares processed the qualifying harvests on board. Catcher vessel QS and IFQ would also be issued in two classes, Class A shares and Class B shares. Class A shares, which will require delivery of harvests to a processor holding processor quota, will be issued for 90 percent of the TAC in each fishery. Class A shares will also be subject to regionalization, under which harvests will be required to be delivered within an identified region. Class B shares, which will permit delivery of harvests to any processor (except catcher/processors) and would not be regionally designated, will be issued for the remaining 10 percent of the TAC. The issuance of Class B shares is intended to provide harvesters with additional market leverage for negotiating prices for landings of crab. The ratio of Class A to Class B shares is intended to balance the interests of processors and communities in continuing participation in the fisheries with the interests of harvesters in having a free market in which to sell harvests.

To receive a QS allocation in a fishery a harvester must hold a valid, permanent, fully transferable License Limitation Program (LLP) license endorsed for the fishery. Since LLP licenses are the current qualification for participation in the fisheries, their use for defining eligibility in the rationalization program will maintain the current fishery participation and are consistent with prior measures by the Council to reduce effort in the fisheries. Reliance on LLP licenses will also streamline administration of the program since the adjudication of most licenses is complete. Use of other criteria would entail additional eligibility adjudication which could be time consuming and inconsistent with current participation requirements.

A harvester's allocation of QS for a fishery would be based on landings in that fishery (excluding landings of deadloss). Specifically, each allocation is the harvester's average annual portion of the total qualified catch during a specific qualifying period. Qualifying periods were selected to balance historical participation and recent participation. Different periods were selected for different fisheries to accommodate closures and other circumstances in the fisheries in recent years. The most recent seasons were excluded in part to limit the effectiveness of efforts by participants to obtain a larger allocation by increasing participation in recent seasons when it was apparent that allocations would be based on historic harvest levels. Qualifying periods for the various fisheries are shown in Table 1.

Table 1 Qualifying periods for harvest shares for each fishery.

Fishery	Qualifying years
Bristol Bay red king crab	1996 - 2000 (best 4 of 5 seasons)
Bering Sea <i>C. opilio</i> (snow crab)	1996 - 2000 (best 4 of 5 seasons)
Bering Sea <i>C. bairdi</i> (Tanner crab)	1991/92 - 1996 (best 4 of 6 seasons)
WAI (Adak) golden king crab	1996/97 - 2000/01 (all 5 seasons)
EAI (Dutch Harbor) golden king crab	1996/97 - 2000/01 (all 5 seasons)
WAI (Adak) red king crab - West of 179° W	1992/93 - 1995/96 (best 3 of 4 seasons)
Pribilof blue and red king crab	1994 - 1998 (best 4 of 5 seasons)
St. Matthew blue king crab	1994 - 1998 (best 4 of 5 seasons)

Generally, qualified catch is the catch of the vessel that created the privilege to the LLP license on which eligibility is based. In some circumstances, the catch of other vessels could be considered qualified catch. Since LLP licenses (and permits under the vessel moratorium program that preceded the LLP) are transferrable from vessel to vessel, catch on the vessel on which a license was used would be included in determining the allocation associated with a license. Because the use of license on a vessel was not recorded during the first two years of the LLP, the number of persons that qualify for this provision is not known with precision. The consistency of participation in the fishery suggests that the provision applies to a small number of participants. An additional provision would permit a person that purchased a LLP license to continue to participate in a fishery to receive an allocation based on the history of the vessel on which the license was used. Less than 12 participants would qualify for this provision. Finally, a provision would permit persons that owned vessels that sank and were replaced under the LLP license qualification rules to credit 50 percent of their average annual

history in qualifying years that the vessel participated, for years that the vessel or its replacement was unable to participate. Less than 10 participants would qualify for this provision. In general, provisions for crediting qualifying catch from a vessel other than the vessel that created the LLP privilege are intended to reward participation in compliance with the LLP or limit the hardships that arise from circumstances outside of a participant's control.

The initial allocation of shares varies from fishery to fishery because of different levels of participation and participation patterns. Figures 4, 5, and 6 show the estimated initial allocation in the different fisheries.

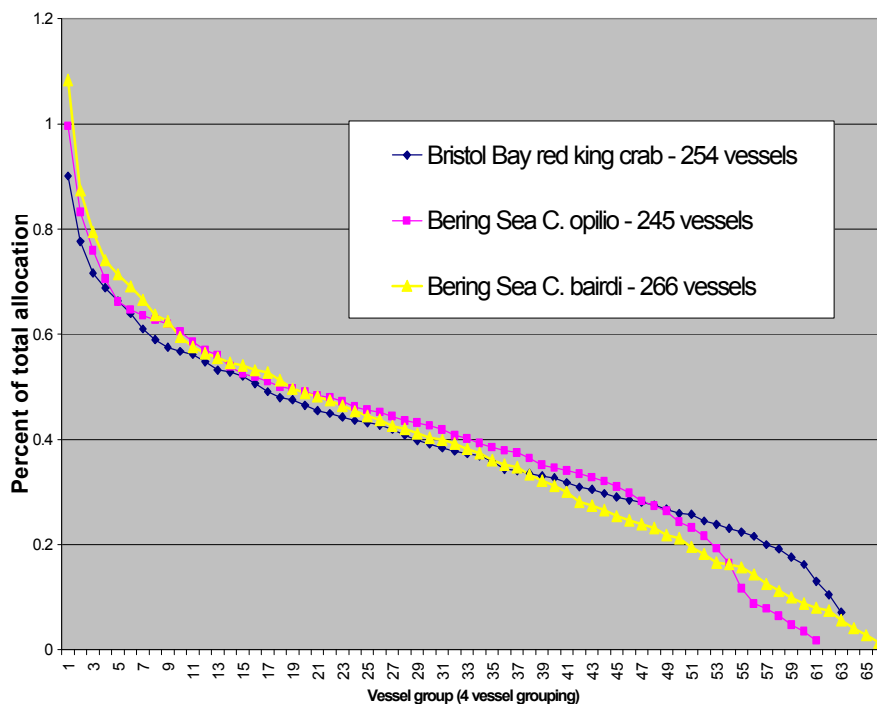


Figure 4 Harvest share allocation for Bristol Bay red king crab and Bering Sea *C. opilio* and *C. bairdi* crab fishery

Source: NPFMC Crab Rationalization Database 2001, Version 1

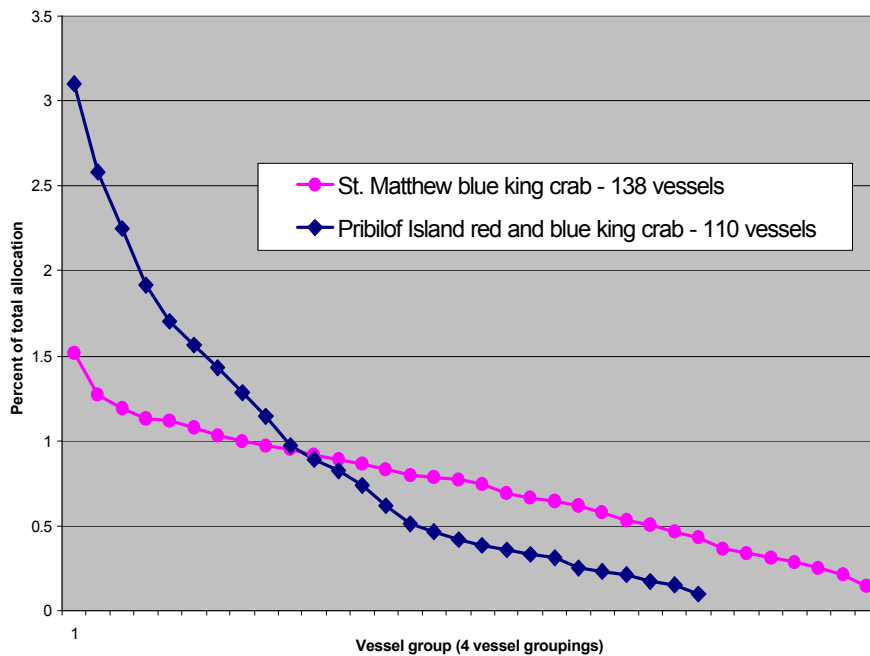


Figure 5 Harvest share allocation for St. Matthew blue king crab and Pribilof Island red and blue king crab fishery

Source: NPFMC Crab Rationalization Database 2001, Version 1

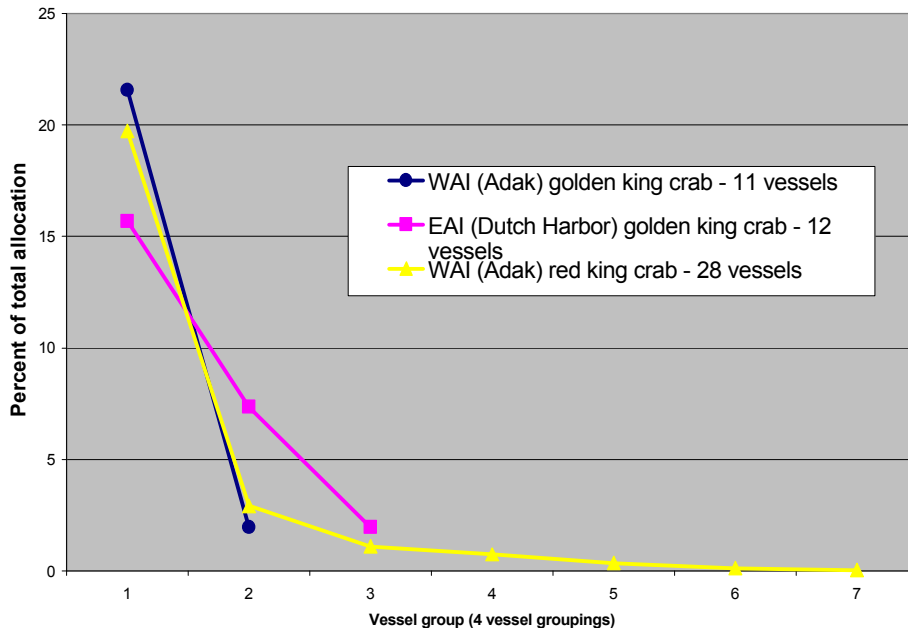


Figure 6 Harvest share allocation for WAI golden and red king crab, and EAI golden king crab fishery

Source: NPFMC Crab Rationalization Database 2001, Version 1

Eligibility and distributions were estimated on a vessel basis.⁸ Since some participants may own interests in multiple vessels and licenses the estimates may not be totally accurate. Confidentiality of vessel and license ownership information prevent more detailed disclosure of the allocations.⁹

To protect confidentiality, the allocations are shown in groups of 4 vessels, with vessel groupings made in descending order from the largest estimated allocation to the smallest allocation. The last and smallest grouping contains between 4 and 7 estimated allocations, since at least 4 persons' activities must be included under confidentiality rules. The estimated allocation shown for each 4 vessel group is the average allocation to members of that group. Allocations are shown as shares of the total harvest allocation. Each legend shows the total number of vessels that would receive an allocation in each fishery. Because allocations are averages, it is possible, particularly in the grouping with the largest allocation, that the largest allocation to a single vessel is significantly different from the average of those four vessels.

⁸ If a vessel engaged in activity that met the eligibility requirements for a distribution, the distribution was estimated using only the activity of the vessel that met the eligibility requirements. Amendment 10 to the LLP creates some exceptions that would entitle some persons to LLP licenses that do not meet these requirements. Records concerning the qualification of persons under the Amendment 10 exceptions to the LLP requirements are not yet available, so that currently, the most complete analysis is based on activities of single vessels. These exceptions are likely to result in the inclusion of more vessels in the allocation. In addition, the suboptions related to license transfers could result in some allocations being larger than the estimated allocations represented here.

⁹ The data collection program included in the preferred rationalization program would require participants to submit ownership information from which individual interests in the fisheries could be analyzed.

The figures and table show that the allocations vary significantly from fishery to fishery. Differences in the allocations arise from the different patterns of participation and catch history in the different fisheries. The Bering Sea *C. opilio* and *C. bairdi* and the Bristol Bay red king crab fisheries have the greatest estimated number of eligible vessels (between 245 and 266) and the least concentrated distribution. In these fisheries, the average of the largest four allocations is approximately 1 percent of the total allocation. The median allocation is approximately 0.4 percent of the total allocation. The allocation in the St. Matthew blue king crab fishery is slightly more concentrated, with 138 vessels estimated to receive an allocation. The average of the largest four allocations in these fisheries would be approximately 1.5 percent of the total allocation. The median allocation would be approximately 0.8 percent. In the Pribilof red and blue king crab fishery 110 vessels are estimated to receive an allocation. The average of the four largest allocations is estimated to be approximately 3 percent. The mean allocation in this fishery is approximately 0.6 percent (slightly less than the median allocation in the St. Matthew blue king crab fishery). The allocations in the Aleutian Islands fisheries are the most concentrated. These fisheries are the most distant from processing and other support facilities, discouraging some participation. The golden king crab fisheries also require additional gear for longlining pots and have limited grounds, complicating entry to those fisheries. Approximately 30 vessels would receive an allocation in the Western Aleutian Islands (Adak) red king crab fishery, which has been closed for several year but is showing signs of recovery. The four largest allocations in this fishery are estimated to average almost 20 percent of the total allocation. The concentration of shares in the fishery is also shown by the low median allocation, which is less than 1 percent. In the two Aleutian Island golden king crab fisheries, slightly more than 10 vessels would receive an allocation. The median allocation in the Western fishery, however, is more concentrated than the Eastern fishery. In the Western fishery, the four largest allocations are estimated to average approximately 22 percent of the total allocation. The median allocation in the fishery is estimated to be approximately 2.6 percent. In the Eastern fishery, the four largest allocations average approximately 16 percent, while the median allocation is slightly less than 8 percent.

QS and IFQ would both be transferrable under the program, subject to limits on the amount of shares a person may own or use. Leasing of QS (or equivalently, the sale of IFQs) may be prohibited, except within cooperatives, after the first five years of the program. Leasing is defined as the use of IFQs on a vessel in which the owner of the underlying QS holds less than a 10 percent ownership interest and on which the underlying QS holder is not present. Transferability of shares is necessary to reduce fleet size and remove capital from the fishery. The limit on leasing of QS (or sale of IFQs) by persons not in cooperatives would be intended to create an incentive for cooperative membership. The interim period in which leasing is not constrained is intended to allow a period of adjustment during which harvesters can coordinate fishing activities and build relationships necessary for cooperative membership.

To be eligible to purchase QS or IFQs a person would be required to be a US citizen and to have at least 150 days of sea time in US commercial fisheries in a harvest capacity. An entity would be eligible to purchase shares only if it is at least 20 percent owned by a US citizen with at least 150 days of sea time in US commercial fisheries in a harvest capacity. Initial recipients of QS and CDQ groups are exempt from these eligibility criteria. These sea time requirements are intended to ensure that the harvest sector does not evolve into a fishery owned by entities that have no fishing background.

Separate caps would be imposed on the ownership of shares by any person¹⁰ and the use of IFQs on any vessel. These caps are intended to prevent excessive consolidation of shares under the program. Limits on consolidation can be used to ensure adequate levels of market competition, facilitate entry to the fishery, protect labor markets, and ensure that the resource supports several participants. Different caps are chosen for the

¹⁰ The Council intends to clarify its position on ownership and use caps at its October meeting. The current Council motion contains only caps on share “ownership”. Since limits on IFQ ownership effectively control the use of shares, ownership caps can be interpreted as capping use. This parallels the interpretation of use caps as limiting ownership adopted in the halibut and sablefish IFQ program.

different fisheries because of different fleet characteristics and the differences in historic dependency of participants on the different fisheries. Vessel use caps would not apply to cooperatives providing an additional incentive for cooperative participation. The ownership and use caps proposed for the different fisheries in the Council's preferred rationalization alternative are shown in Table 2 below.

Ownership caps are applied individually and collectively. Under this rule all of a person's direct holdings are credited toward the cap. In addition, a person's indirect holdings are also credited toward the cap in proportion to the person's ownership interest. For example, if a person owns a 20 percent interest in a company that holds 100 shares, that person is credited with holding 20 shares for purposes of determining compliance with the cap.¹¹ These ownership rules are thought to be more effective in preventing excessive consolidation of shares. The accuracy of the analysis of ownership caps, however, is limited by the lack of availability of complete ownership data. The analysis relied on registered license holder data files, which do not show ownership holdings beyond the registered owner. Detailed ownership data necessary for full analysis of ownership is currently unavailable because of restrictions that prevent analysts from accessing detailed ownership information. Application of the rules under the program will require the submission of detailed ownership information by shareholders.

Table 2. Ownership and use caps for the crab fisheries.

	Number of owners ¹	Ownership cap	Number of owners over the cap	Number of vessels ²	Vessel use cap	Number of vessels over the cap
Western Aleutian Islands (Adak) Golden King Crab	14	0.1	*	11	0.2	*
Western Aleutian Islands (Adak) Red King Crab	38	0.1	6	28	0.2	*
Bristol Bay Red King Crab	303	0.01	10	254	0.02	0
Bering Sea C. <i>Opilio</i>	290	0.01	16	245	0.02	0
Bering Sea C. <i>Bairdi</i> (EBS Tanner Crab)	312	0.01	17	266	0.02	0
Eastern Aleutian Islands (Dutch Harbor) Golden King Crab	15	0.1	6	12	0.2	*
Pribilof Red and Blue King Crab	136	0.02	18	110	0.04	0
St. Matthew Blue King Crab	163	0.02	*	138	0.04	0

Sources: NPFMC Crab Rationalization Database, Version 1, 2001 and NMFS, RAM license registration files (2001).

1. Allocations to vessels are aggregated based on LLP license ownership files of NMFS RAM.

2. Allocations are on a vessel basis without aggregation.

Table 2 also shows the estimated number of registered license holders that would be allocated shares in each fishery under the rationalization program and the number that would exceed the applicable ownership caps. Initial allocations of shares above the cap would be grandfathered. The number of allocations over the specified levels varies from fishery to fishery with the number of participants and the differences in participation patterns. The Aleutian Islands fisheries, which have the least participants, are the most concentrated. In two of the three Aleutian Islands fisheries, six owners would receive allocations in excess of 10 percent of the total allocation. The number of vessels receiving allocations in excess of 20 percent cannot be shown in any fishery because of confidentiality restrictions. The St. Matthews and Pribilof Islands fisheries between 40 and 50 owners would receive allocations in excess of one percent of the total allocation. In the Pribilof Islands fishery, the number of persons receiving an allocation in excess of 5 percent cannot be shown, while no owner would receive an allocation in excess of 5 percent in the St. Matthew fishery. In the Bristol Bay red king crab, the Bering Sea C. *opilio*, and the Bering Sea C. *bairdi* fisheries no owners would receive an allocation in excess of 5 percent and less than 20 would receive an allocation in excess of 1 percent.

To protect independent vessel owners and processors that are not vertically integrated, processor ownership of harvest shares will also be limited by caps on vertical integration. A processor's ownership of QS is limited

¹¹Because use caps are applied on a vessel basis, no similar issue arises in applying use caps.

to 5 percent of the QS pool on a fishery basis. These caps are applied using a threshold rule for determining whether the shares are held by a processor, and then the individual and collective rule for determining the extent of share ownership. Under the threshold rule, any entity with 10 percent or more common ownership with a processor is considered to be a part of that processor. Any direct holdings of those entities would be fully credited to the processor's holdings. Indirect holdings of an entity would be credited toward the processor's cap in proportion to the entity's ownership. The rules for applying the caps on vertical integration are thought to be appropriate for limiting consolidation of harvest shares by processors. Initial allocations of shares above the cap would be grandfathered. The analysis of vertical integration relied on ownership data provided to the analysts by major processors that participate in the BSAI crab fisheries. These data were voluntarily submitted to assist Council staff with the analysis and were fully disclosed during the Council proceedings.

Table 3 shows the number of processors with affiliated vessels, the number of vessels affiliated with processors, and allocations to those vessels. A vessel and processor with 10 percent common ownership are considered affiliated, as required by the threshold rule in the Council's preferred alternative. Vertical integration varies by fishery. The three Aleutian Islands fisheries have a single processor affiliated with a single participating vessel. In the Pribilof and St. Matthews fisheries, four processors are affiliated with 9 and 10 vessels. These processor affiliated vessels will receive between 8 and 12 percent of the total allocation. In the Bristol Bay and Bering Sea fisheries, six processors are affiliated with between 25 and 35 vessels. These vessels will receive slightly more than 12 percent of the total allocation in these fisheries. Confidentiality restrictions prevent the disclosure of the number of allocations over specific levels.

Table 3. Number of processor/vessel affiliations by fishery.

Fishery	Number of processors affiliated with vessels	Number of vessels affiliated with processors	Number of vertically integrated allocations over 2.5%	Number of vertically integrated allocations over 5%	Total allocation to processor affiliated vessels
Western Aleutian Islands (Adak) Golden King Crab	1	1	0	0	*
Western Aleutian Islands (Adak) Red King Crab	1	1	0	0	*
Bristol Bay Red King Crab	6	31	*	*	0.125
Bering Sea C. Opilio	6	25	*	0	0.122
Bering Sea C. Bairdi (EBS Tanner Crab)	6	33	*	*	0.127
Eastern Aleutian Islands (Dutch Harbor) Golden King Crab	1	1	*	0	*
Pribilof Red and Blue King Crab	4	9	*	*	0.117
St. Matthew Blue King Crab	4	10	*	0	0.086

* Withheld for confidentiality.

Sources: NPFMC Crab Rationalization Database, Version 1, 2001 and processor vessel ownership information (2001).

The Processing Sector

The preferred rationalization program would also create a processing privilege, which would be allocated to processors, that is analogous to the harvest privilege allocated to harvesters. These allocations to processors are intended to protect processor investment in the fisheries and balance the bargaining power of processors with harvesters receiving harvest shares. Processors will be allocated processing quota shares (PQS) in each fishery rationalized by the program. PQS are a revocable privilege to receive deliveries of a specific portion of the annual TAC from a fishery. These annual allocations of processing privileges are referred to as Individual Processing Quotas (IPQs). IPQs would be issued for 90 percent of the allocated harvests, corresponding to the 90 percent allocation of Class A harvest shares.¹² The annual IPQ allocation would equal the percent of the total PQS pool held by a processor times 90 percent of the TAC, the portion of the TAC for which processor shares are allocated. Leaving the remaining 10 percent of processing unallocated, and therefore deliverable to any processor, is intended to strike a balance of bargaining power between the harvesting and processing sectors. In addition, this unallocated 10 percent of processing would allow entry to that sector.

Processors that processed crab in either 1998 or 1999 would be eligible for an initial allocation of PQS. Under a hardship provision, a processor that failed to meet this requirement but that processed *C. opilio* in all years from 1988 to 1997 and invested in excess of \$1 million dollars in processing equipment and improvements after 1995 would be eligible for an allocation. The use of these eligibility criteria are intended to prevent reentry of processors that have already elected to exit the fisheries. Processing shares will be regionally designated for processing in a North or South region (corresponding to the regional designation of the Class A harvest shares).

PQS allocations would be based on processing history during a specified qualifying period for each fishery. A processor's allocation in a fishery would equal its share of all qualified processing in the qualifying period (i.e., pounds processed by the processor divided by pounds processed by all qualified processors). The qualifying periods for determining processor allocations shown in Table 4.

Table 4. Qualification Periods for Processor Share Allocations.

Fishery	Qualifying years
Bristol Bay red king crab	1997 - 1999 (3 seasons)
Bering Sea <i>C. opilio</i> (snow crab)	1997 - 1999 (3 seasons)
Bering Sea <i>C. bairdi</i> (Tanner crab)	Based 50 percent on allocation for Bristol Bay red king crab and 50 percent on allocation for Bering Sea <i>C. opilio</i>
WAI (Adak) golden king crab	1996/97 - 1999/2000 (4 seasons)
EAI (Dutch Harbor) golden king crab	1996/97 - 1999/2000 (4 seasons)
WAI (Adak) red king crab - West of 179° W	Based on allocation for WAI (Adak) golden king crab
Pribilof blue and red king crab	1996 - 1998 (3 seasons)
St. Matthew blue king crab	1996 - 1998 (3 seasons)

Allocations will made to the buyer of record on Alaska Department of Fish and Game fish tickets, except if the buyer can be determined to be an entity other than the entity named on the fish ticket, by the State of Alaska

¹²Processor privileges would not apply to the remaining 10 percent of the TAC (corresponding to the 10 percent of the TAC allocated as Class B harvest shares).

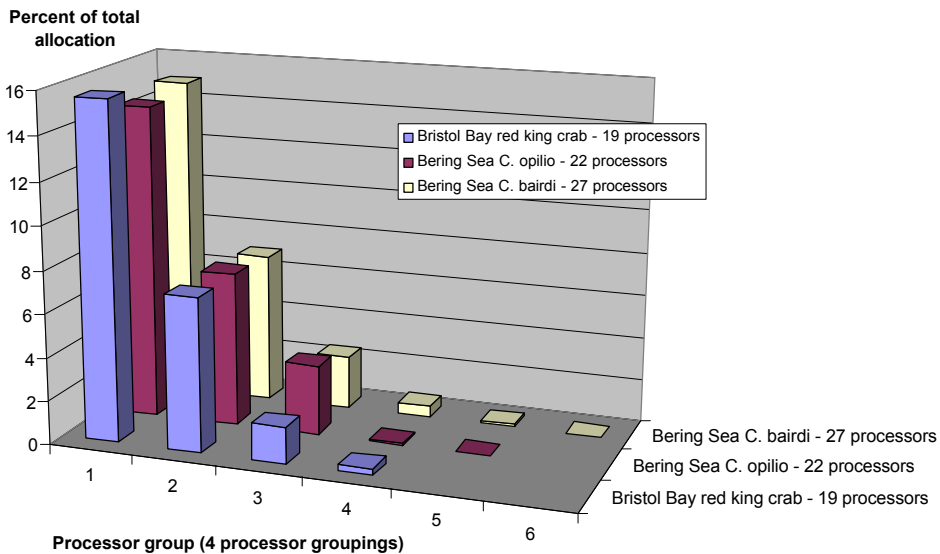


Figure 7 Processor share allocations in the Bristol Bay red king crab, Bering Sea c.opilio and the Bering Sea c.bairdi crab fisheries. Source NPFMC crab rationalization database, 2001, Version 1

Commercial Operators Annual Report, fish tax records, or other evidence of direct payments to fishermen. This rule reflects an intention to allocate shares to the entity which purchased the crab and funded the processing activity. Several processors have made “custom processing” arrangements with other processors, under which one entity processes crab on behalf of another entity. Under these arrangements, the processing activity is often funded by an entity other than the entity taking

delivery of the crab.¹³

Figures 7, 8, and 9 show the distribution of processing share allocations.¹⁴ As with harvesters, the allocations are grouped into 4 processor groupings to protect confidentiality. Processor groupings were made in descending order from the largest estimated allocation to the smallest allocation. The last and smallest grouping contains between 4 and 7 estimated allocations, since at least 4 persons’ activities must be included under confidentiality rules. The estimated allocation shown for each 4 vessel group is the average allocation to members of that group. Allocations are shown as shares of the total processing allocation. Each legend shows the total number of vessels that would receive an allocation in each fishery. Because allocations are averages it is possible, particularly in the grouping with the largest allocation,

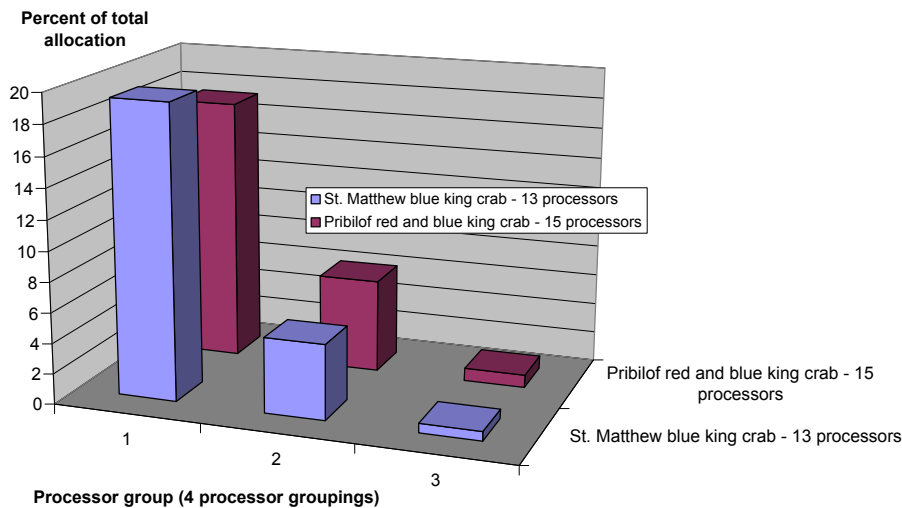


Figure 8 Processor share allocations in the St. Matthew blue king crab and Pribilof red and blue crab fisheries. Source: NPFMC crab rationalization database, 2001, Version 1

that the largest allocation to a

¹³ The quantitative analysis of the allocations relied strictly on fish ticket data, and therefore does not show custom processing relationships in the fishery. Detailed information on custom processing is not readily available. Available information shows that custom processing accounts for between 7 and 10 percent of all processing in the BSAI crab fisheries.

¹⁴ Processor allocations are aggregated at the company level based on processor facility ownership information verified with participating processors.

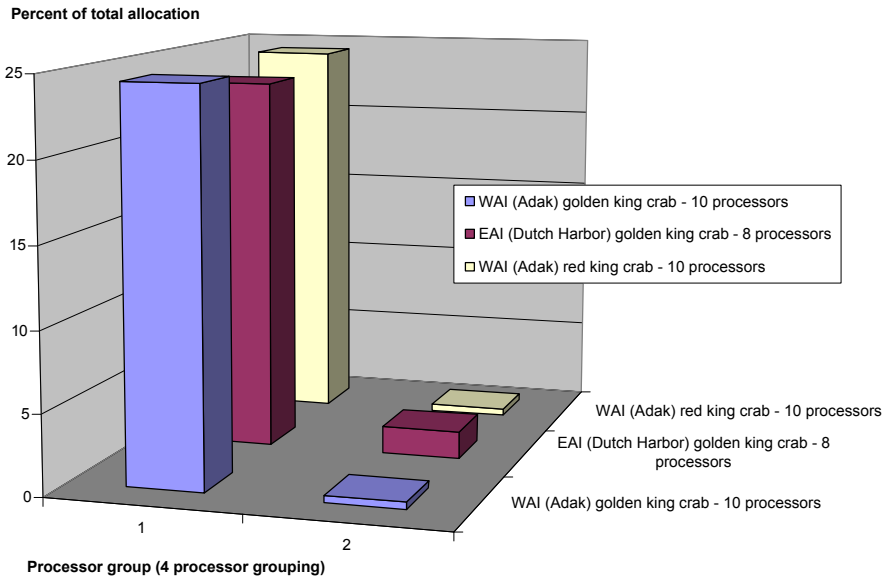


Figure 9 Processor allocations in the Aleutian Island king crab fishery
 Source: NPFMC crab rationalization database, 2001, Version 1

single processor is significantly different from the average of those four processors. In addition to the graphs, Table 5 shows the average of the four largest allocations, the mean allocation, and the median allocation under each option.¹⁵

Processor allocations are substantially more concentrated than harvester allocations. This relative concentration occurs for two reasons. First and of greater importance, there are relatively fewer processors active in the fisheries than vessels active in the fishery. Second, more complete ownership information

is available concerning processors. Processor allocations were aggregated to the company level. Company ownership of facilities was determined based on existing records with the assistance of processor representatives.¹⁶ This allowed the analysts to obtain a fairly reliable ownership aggregation of facilities. Records of vessel ownership that are reliable are not available. Allocations of processing to catcher/processors are included and are calculated in the same manner as for floating and shore based facilities, but are not aggregated at the company level because of the lack of vessel ownership data.

As in the harvest sector, processing allocation concentration varies across fisheries. The Aleutian Islands fisheries have the greatest concentration, with the four largest allocations comprising in excess of 90 percent of the total allocation. The Eastern Aleutian Islands golden king crab fishery has the largest median allocation - 6 percent. Only 8 processors will receive an allocation in this fishery, so only 4 processors would receive allocations in excess of the median. In the Pribilof and St. Matthews fisheries, the allocations are slightly less concentrated with the four largest allocations making up between approximately 70 and 80 percent of the total allocation. These fisheries have median allocations of approximately 4 percent, showing that between 6 and 7 processors would receive allocations larger than 3 to 4 percent. In the Bristol Bay and Bering Sea fisheries, the allocations to the four largest processors is approximately 60 percent of the total allocation. The low medians of these allocations together with the total number of processors receiving allocations show that approximately 10 processors would receive allocations in excess of 1 to 2 percent. In addition, the graph of the allocations in these fisheries show that approximately 8 processors would receive allocations in excess of 5 percent.

¹⁵ The mean allocation is the average allocation. The median allocation is the allocation at the midpoint in the distribution, for which half of the allocations are larger and half of the allocations are smaller.

¹⁶ The facility ownership aggregations used by the analysts appear in Appendix 3-3 of the Council analysis of Crab Rationalization, which is attached as Appendix A of this document. Some of the companies on that list have common owners. Peter Pan and Steller Sea have some common ownership, as do Westward Seafoods and Alyeska Seafoods. Depending on the rules chosen for determining ownership for purposes of applying caps, these companies with common owners might be considered a single entity. These companies were considered separate entities for purposes of the AFA.

Processor shares would be transferable, including leasing of PQS (or equivalently, the sale of IPQs) subject only to use and ownership caps. IPQs would be usable at any facility of a processor without transfer. In addition, new processors would enter the fishery by purchasing PQS or IPQs or by purchasing crab harvested with Class B shares or CDQ crab.

Ownership of PQS would be limited to 30 percent of the outstanding PQS in a fishery.¹⁷ As with vertical integration caps, PQS ownership caps would be applied using a threshold rule for determining whether the shares are held by a processor and then the individual and collective rule for determining the extent of share ownership. Under the threshold rule, any entity with 10 percent or more common ownership with a processor is considered to be a part of that processor. Any direct holdings of those entities would be fully credited to the processor's holdings. Indirect holdings of those entities would be credited toward the processor's cap in proportion to the entities ownership. Initial allocations of shares above the cap would be grandfathered. In addition, in the *C. opilio* fishery no processor would be permitted to use in excess of 60 percent of the IPQs issued in the Northern region. Processing use caps for other species and regions were not included. The number of allocations in excess of the ownership cap in each fishery are shown in Table 5.

Table 5 Processor allocation statistics and share caps.

Fishery	Mean	Median	Average of four largest allocations	Number of processors	Allocations in excess of the 30% cap
Western Aleutian Islands (Adak) Golden King Crab	0.100	0.008	0.244	10	*
Western Aleutian Islands (Adak) Red King Crab ¹	0.100	0.008	0.244	10	*
Bristol Bay Red King Crab	0.053	0.017	0.156	19	0
Bering Sea <i>C. Opilio</i>	0.045	0.020	0.145	22	0
Bering Sea <i>C. Bairdi</i> (EBS Tanner Crab)	0.037	0.006	0.150	27	0
Eastern Aleutian Islands (Dutch Harbor) Golden King Crab	0.125	0.060	0.233	8	*
Pribilof Red and Blue King Crab	0.067	0.038	0.173	15	0
St. Matthew Blue King Crab	0.077	0.043	0.193	13	*

¹ Allocation is based on the WAI (Adak) golden king crab allocation.

² Withheld for confidentiality.

Sources: NPFMC Crab Rationalization Database, Version 1, 2001.

Catcher/processor provisions

Catcher/processers participate in both the harvest and processing sectors and therefore have a unique position in the program. A few provisions of the program have been developed to address this unique position. These provisions are intended to protect the historic role and participation of catcher/processers under the program. Catcher/processers will be allocated catcher/processor QS and corresponding catcher/processor IFQs under the program. These shares will carry both a harvest privilege and an accompanying on board processing privilege. To be eligible for catcher/processor shares, a person must be eligible for a harvest allocation by holding a permanent, fully transferable catcher/processor LLP license. In addition, the catcher/processor must have processed crab in either 1998 or 1999. These requirements parallel the harvester and processor eligibility requirements. Persons meeting these eligibility requirements will be allocated catcher/processor shares in accordance with the allocation rules for harvest shares for all qualified catch that was processed on board.¹⁸

¹⁷ As noted above, the Council will clarify its position on ownership and use caps at its October meeting. If the Council intends for ownership caps to apply to IPQ holdings, these caps are effectively use caps. If interpreted as such, the use cap on North shares in the Bering Sea *C. opilio* fishery would be an exception to the 30 percent cap on share ownership and use that is proposed for other fisheries.

¹⁸ Catcher/processers that meet only the harvest eligibility requirement would receive an allocation of catcher/vessel shares for any qualified catch. Likewise, catcher processors that meet only the processing eligibility requirement would receive only processor shares.

Participants that meet one but not both eligibility requirements would be allocated shares for the sector in which they meet eligibility requirements.

Since catcher/processor shares provide both harvesting and on board processing privileges, a person holding those shares may harvest and process crab under the allocation. In addition, holders of catcher/processor IFQs may choose not to process harvested crab, instead delivering that unprocessed crab to any other processor. Use of catcher/processor shares in this manner would be akin to the use of Class B harvest shares, which do not require the receiving processor to hold IPQs. Catcher/processor shares would not have regional designations, so the delivery of these shares will not be regionally limited.

Holders of catcher/processor shares may also sever the harvesting and processing privileges, thereby creating separate Class A catcher vessel QS and PQS. These newly severed interests would create a privilege to annual IFQ allocations and IPQ allocations, which could be held by different individuals. When severed, the resulting QS and PQS must be designated for a region with both shares taking the same regional designation. Allowing the conversion of shares permits a catcher/processor shareholder to realize the full value of shares and provides greater flexibility in using the privileges. Adding a regional designation would prevent the creation of a new class of shares—Class A shares without a regional designation—for which the market would be extremely limited.

Some catcher/processers currently accept delivery of crab from catcher vessels for processing. PQS will be allocated based on this activity to the extent that vessels are eligible and have qualified processing history. In addition, catcher/processor will be permitted to purchase additional PQS for processing on board, provided that processing takes place within 3 miles of shore in the applicable region. The requirement of processing within 3 miles of shore is intended to ensure that regional benefits of processing activity are received by the region. The various rules affecting catcher/processers are intended to retain the historic role of catcher/processers in the BSAI crab fisheries, while at the same time protecting the interests of communities and other participants and beneficiaries of the fisheries.

Cooperatives

The program would permit harvesters to form voluntary cooperatives associated with one or more processors holding PQS. Cooperatives are intended to facilitate efficiency in the harvest sector by aiding harvesters in coordinating harvest activities among members and deliveries to processors. Both sectors could realize efficiencies through well coordinated activities and flow of product. Harvesters can benefit by the cooperative relationship through which shares can be quickly traded under prearranged terms and conditions. These trades help harvesters consolidate small portions of their allocations on a single vessel when a small portion of each vessel's allocation is remaining. In the pollock cooperatives organized under the American Fisheries Act, harvesters have effectively coordinated harvests so that less than 1 percent of the TAC is unharvested. In the halibut and sablefish fisheries, which are managed with IFQs with limited leasing, harvesters have left more than 5 percent of the TAC unharvested. Processors can also benefit from cooperatives, which can coordinate deliveries so that processing crews and equipment have less down time between deliveries. Delivery coordination can also reduce queuing of harvesters waiting to offload their harvests, reducing deadloss of harvested crab.

A minimum membership of four unique QS holders would be required for cooperative formation. Cooperatives would be required to file a cooperative agreement with the Secretary of Commerce annually, after Council review. Once the filing is made, the cooperative would receive the annual allocation of its members in the applicable fisheries. Cooperative members would be permitted to leave a cooperative at any time after one season. Departing members would be permitted to retain their QS and the associated IFQ allocations, which they could bring to other cooperatives. Processors that associate with cooperatives would not be members of the cooperatives but would remain independent. A cooperative would not be bound to deliver any harvests to

an associated processor provided that the cooperative complies with any delivery requirements of the program associated with the harvest and processing shares. Processor association, however, is intended to facilitate delivery coordination.

Harvesters within a cooperative would be permitted to transfer shares freely and vessels on which cooperative shares are fished would not be subject to use caps. Shares would also be freely transferable between cooperatives, but these transfers would require filing with NOAA Fisheries Restricted Access Management office before shares could be fished.

New processors would be permitted to enter the fishery by purchasing PQS or IPQs, by purchasing crab harvested with Class B shares (which do not require delivery to a processor holding IPQs), or by purchasing CDQ crab. Entering processors would be permitted to associate with a cooperative and take delivery of crab harvested with Class A shares to the extent that they own IPQs to process that crab. Custom processing would be permitted under the cooperative program to facilitate greater efficiency in the processing sector.

Binding Arbitration

BSAI crab fisheries have a history of contentious price negotiations. Harvesters have often acted collectively to negotiate an ex vessel price with processors, at times delaying fishing to pressure price concessions from processors. Participants in both sectors are interested in ending that practice in the rationalized fishery. Because the rationalization program is novel, the effects on price negotiations cannot be fully predicted. To ensure fair price negotiations under the new program, the Council has included a provision for binding arbitration for the settlement of price disputes. The binding arbitration system is intended to compel shareholders to offer reasonable terms and, if necessary, establish reasonable price when a negotiated price cannot be reached. In a system with a one-to-one relationship of harvest and processing shares, the market of persons for a shareholder to transact with will be limited. The concern is most acute for the shareholders from each sector that are last to contract for their shares. The system of arbitration would be available to settle price disputes between holders of Class A harvest shares (that restrict delivery to holders of unused IPQs) and holders of processor shares, because these are shares for which markets are limited. The Council has appointed a committee that is currently developing detailed options for the system of binding arbitration. After analysis, the Council will select a preferred arbitration option to incorporate into the rationalization program. The committee's primary objective in developing an arbitration program has been to ensure that the system is adequate to protect all participants in the fisheries. Under all of the options, each processor would act independently in its price negotiations with harvesters to prevent collusive behavior on the part of processors. Harvesters could act collectively as permitted by the 1934 Fishermen's Marketing Act.

NOAA General Council identified two concerns related to binding arbitration, which the committee has made significant efforts to address. The first concern is that administration of the arbitration program by National Marine Fisheries Service (NOAA Fisheries) or another federal agency would be very cumbersome, as each program change would require public decision making and the use of the related public notice and procedure for adopting the change. The committee has identified an approach to management, under which the Council and NOAA Fisheries would approve the framework and structure of the program. Direct program administration could be accomplished by participants. The program could be monitored through a series of reporting requirements, which could be relied on together with the public Council process to identify areas of program modification and adaptation. The second stated concern of NOAA General Counsel could also be addressed by this framework structure and monitoring approach. The second concern is that the program would entail over-involvement of the agency in private contracting and markets. The indirect management and monitoring of the arbitration process suggested by the committee would enable adequate oversight of the arbitration process, without over-involvement of the agency in private transactions. In short, the committee believes that it has developed a system of oversight and monitoring of the arbitration process that preserves an adequate and acceptable level of government involvement. A similar administrative system used for the

oversight of AFA cooperatives has proven highly successful. The committee believes the suggested framework would achieve similar success.

Captains Shares and the Crew Loan Program

To protect captains' historical interests in the fisheries, eligible captains would be allocated 3 percent of the TAC under the program. To be eligible for an allocation a captain would be required to demonstrate both historical dependence on the fishery and recent participation. Allocations to captains would be based on participation in landings during the same qualifying years applicable to QS allocations. To ensure that these captain share allocations benefit at sea participants in the fisheries, holders of the underlying QS would be required to be on the vessel harvesting the IFQs. Additional provisions concerning the allocation of shares to captains, including rules governing eligibility for an allocation and transferability, are to be developed by a committee to be considered by the Council for incorporation into the rationalization program.

To further aid captains and crew a low interest loan program (similar to the loan program under the halibut and sablefish IFQ program) would be created. This program would be funded by 25 percent of the funds collected under the fee program applied to shareholders in the BSAI crab fisheries.

Regionalization

To protect communities from the disruption of the current pattern of landings and processing that might be caused by changing the management of the BSAI crab fisheries, the Council has included a regionalization program as a part of its preferred alternative for rationalization. Completely constraining the geographic movement of activities would likely overly restrict consolidation of activities that might be desirable for reducing capacity and gaining efficiency in both the harvesting and processing sectors under rationalization. The regionalization program that the Council developed divides the fishery into two regions, allowing movement of activities within each region. The limited restraint on consolidation is intended to balance community interests against the need for consolidation and efficiency that motivated the change to a rationalized fishery.

Class A harvest shares (which require delivery to a processor holding unused IPQs) and processor shares would be regionally designated under the program. Crab harvested with regionally designated shares would be required to be delivered to a processor in the designated region. Likewise, a processor with regionally designated shares would be required to accept delivery of and process crab in the designated region. Class B harvest shares would not be subject to regional landing requirements. Crab harvested with Class B shares could be landed at any location under the program. Permitting harvesters greater latitude for landing crab harvested with Class B shares is intended to both simplify the logistical restrictions created by the regionalization program and provide harvesters with a broader market for that crab.

Two regional designations would be created in most fisheries. The North region would be all areas on the Bering Sea north of 56°20' N latitude. The south region would be all other areas. The regional designation is intended to preserve the historic geographic distribution of landings in the fisheries. Communities in the Pribilof Islands are the prime beneficiaries of the regionalization of the program.

Shares of both sectors would be designated based on the location of the activity that gave rise to the allocation. For example, qualified catch delivered in a region would result in shares designated for that region. Discrepancies in the North/South allocations in the two sectors would occur because of the differences in qualified catch caused by the qualification requirements and differences in qualification years for the sectors. This discrepancy would be corrected by redesignation of a portion of the harvest sector allocation. Only persons receiving harvest share allocations in both regions would have a portion of their shares redesignated. The number of a person's shares redesignated would be proportional to the total allocation in the region.

The Council's rationalization program would create exceptions to the North/South regional designations. In the Western Aleutian Islands (Adak) golden king crab fishery, 50 percent of the Class A shares and processing shares would be designated as Western shares. The remaining 50 percent of the Class A share and processing share allocations would have no regional designation and would not be subject to a regional delivery requirement.¹⁹

A second exception to the regionalization program would be the Bering Sea *C. bairdi* fishery, which would have no regional designation. This fishery is anticipated to be conducted primarily as an incidental catch fishery with the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries making any regional designation operationally difficult and potentially overly restrictive. The regional distributions of the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries are likely to determine the regional land pattern in the Bering Sea *C. bairdi* fishery.

Table 6 shows the distribution of shares under the regionalization program in fisheries with the North/South regionalization. Certain processing activity could not be regionally designated for this report. This processing took place on floating processors and catcher/processors, both of which are mobile, complicating the regional designation. The table shows that processing in the two Aleutian Islands fisheries was conducted almost exclusively in the South region. Processing in the Bristol Bay red king crab fishery is also almost exclusively conducted in the South, with less than 10 percent of processing in the North. Processing in the Bering Sea *C. opilio* fishery is split almost evenly between the two regions. Processing in the Pribilof red and blue king crab and the St. Matthew blue king crab fisheries are more concentrated in the North region, where between 65 and 75 percent of all harvests are landed and processed.

Table 6 North/South Regionalization distribution of shares.

Fishery	Region	Share	Number of processors	Number of vessels
Western Aleutian Islands (Adak) Red King Crab	South	1.00*	8	24
	Unknown	*	2	6
Bristol Bay Red King Crab	North	0.095*	2	12
	South	0.905	15	245
	Unknown	*	7	46
Bering Sea C. Opilio	North	0.462	7	197
	South	0.468	18	209
	Unknown	0.070*	5	72
Eastern Aleutian Islands (Dutch Harbor) Golden King Crab	South	1.000	8	11
Pribilof Red and Blue King Crab	North	0.675*	4	74
	South	0.325	11	76
	Unknown	*	3	13
St. Matthew Blue King Crab	North	0.724	4	113
	South	0.276*	9	78
	Unknown	*	2	29

* Value suppressed for confidentiality. All asterisked values are combined in a single cell for each fishery.

Source: NPFMC Crab Rationalization Database, Version 1, 2001

Community Protection Options

In addition to the regionalization component, the Council action currently contains several different options intended to further protect communities. These will be evaluated as part of a trailing amendment package, including provisions requiring payments to communities by processors that wish to relocate processing activity, limits on pounds of IPQs that could be allocated in any season, and a first right of refusal to CDQ groups or community organizations for IPQs. If adopted these provisions would be intended to protect and grant benefits to individual communities (as opposed to regions) under the program.

¹⁹ The Council could apply this designation either to all individual allocations regardless of landings history or based on historical landings of individual participants.

Community Development Allocation

The program would also make changes in the allocations under the Community Development Quota program. The program would be broadened to include the Eastern Aleutian Islands (Dutch Harbor) golden king crab fishery and the Western Aleutian Islands (Adak) red king crab fishery. In addition, the allocations in all crab fisheries covered by the program would be increased to 10 percent from its current level of 7.5 percent.²⁰ CDQ groups would be required to deliver at least 25 percent of the allocation to shore based processors.

The Council motion also provides that an allocation would be made to the community of Adak from the Western Aleutian Islands (Adak) golden king crab fishery in an amount equal to the unused resource during the qualifying period. This allocation, however, would be capped at 10 percent of the total allocation in that fishery. Since approximately 12 percent of the GHF was unharvested during the qualifying period, the 10 percent cap would apply. This allocation to Adak is thought to be appropriate because that community was excluded from the CDQ program because of its history as a military community. The allocation to Adak is intended to stimulate economic activity, since the military has left the community leaving it with little economic base.

Sideboards to Protect Participants in Other Fisheries

Rationalization of the BSAI crab fisheries will affect the fishing patterns of current participants. Some participants may sell or lease their shares. Other participants could change the timing of their fishing. In either case, rationalization could allow BSAI crab fishers to increase participation in other fisheries. To protect participants in these other fisheries, the Council will evaluate sideboards in a trailing amendment package. Sideboards will be considered for the Gulf of Alaska groundfish fisheries and the Bering Sea Korean haircrab fishery, the fisheries that are most likely to experience an influx of effort as a result of the rationalization program.²¹

Crab harvests by vessels that participate in the Bering Sea pollock fisheries are currently limited by sideboard restrictions established under the American Fisheries Act. Likewise, the quantity of crab processed by entities that participate in the Bering Sea pollock fisheries are also limited by sideboards established under the AFA. Since the crab fisheries would be rationalized, these sideboard restrictions would be removed under the crab rationalization program.

Rationalizing the BSAI crab fisheries will likely provide the opportunity for fishing and processing firms to consolidate their BSAI crab operations. As firms consolidate, some assets may be freed up to participate in fishing or processing activities they have not historically, or they may increase their levels of participation in fisheries outside the crab rationalization program. To protect the historic participants in those other fisheries, the Council is considering placing limits on the BSAI crab industries participation in fisheries outside the rationalization program. These limits are referred to as sideboards.

After an initial review of the opportunities that firms participating in the BSAI crab fisheries would have to expand into other fisheries, the Council has asked for additional analysis of potential impacts on the Gulf of

²⁰ The increase would not apply in the Norton Sound fisheries, which are excluded from the rationalization program.

²¹ The Korean hair crab fishery is a small fishery that is not included in the Federal Management Plan. The fishery is currently managed by the State of Alaska.

Alaska groundfish fisheries and the Bering Sea Korean hair crab fishery. Other fisheries were determined to be adequately protected, given the current management measures²² already in place.

An analysis of the spillover impacts on the GOA fisheries (with emphasis on Pacific cod) as well as the Korean hair crab fisheries will be conducted prior to the release of the initial review draft of the EIS/RIR/IRFA in October 2002. Based on that analysis the Council will then be in a position to make a decision on the need for sideboard protections when it makes its final decision on the crab rationalization program. Sideboard protections could then be implemented as part of the overall crab rationalization program.

Data Collection

The Council approved the development of a comprehensive, mandatory data collection system as part of the rationalization program. As envisioned, the program will mandate the collection of data (including cost, revenue, ownership, and employment data) from both harvesters and processors that participate in the BSAI crab fisheries. The data would provide analysts, managers, scientists, and the Council with adequate information to study the impacts of the rationalization program and develop any future amendments to the program.

A group of economists and other fisheries managers has been working with industry to develop the data collection program. The inter-agency workgroup has developed the following recommendations for the program.

1. Statutes be changed to require (or at a minimum allow) NOAA Fisheries and the NPFMC to collect these data from fish harvesters and processors.
2. The requirement to collect these data should include a time certain start date when the data collection would commence.
3. The requirement to collect historic data should be included in any legislation authorizing this program.
4. Authority to protect the confidential data from forced public release should be included in the legislation.

Each of these points is discussed in more detail.

Implementing the proposed program would require changes to the Magnuson-Stevens Act as well as other laws governing the collection of data from fishermen and processors. Changes to the Magnuson-Stevens Act would be required in Section 303(b)(7) and Section 402(a). Section 303(b)(7) prohibits the Council and NOAA Fisheries from collecting economic data from fish processors. Section 402(a) prohibits the Council from requesting that the Secretary implement an information collection program for the fishery which would provide the types of "information that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations". Because other laws may also prohibit the Council and NOAA Fisheries from collecting these data, it may be appropriate to include a general statement that the authority and requirement to collect these data would supercede other Federal laws that may be in conflict.

Providing a time certain start date for the collection of these data would help to ensure that the program is implemented quickly. The goal of the program is to gather the data necessary to provide an understanding of

²²These measures include the License Limitation program (BSAI groundfish and scallop fisheries), Pacific cod allocations by gear type in the BSAI, AFA rationalization of the BSAI pollock fishery, and vessel length and gear restrictions in several State waters fisheries.

how crab rationalization changed the fishery and the impacts it has had on the participants²³. To accomplish this goal a time series of data that starts well prior to the implementation of the program is needed. Starting the program as soon as possible will help meet this objective.

Also related to the need to have adequate data on the fishery prior to implementation of crab rationalization is the request that NOAA Fisheries and the Council be authorized and required to collect historic data. Currently NOAA Fisheries and the Council are unable to require the submission of data related to the activity of harvesters and processors in previous years. The authority and requirement to collect these data would provide the information needed to better understand the pre-rationalization fishery. Requiring that the data are submitted would also help to protect the confidentiality of the data.

To provide persons supplying these data with an assurance that these data will be held as confidential, strong protections on their release need to be implemented. Members of industry have expressed concern that the sensitive data being requested might be released to persons²⁴ who were not initially intended to access the data. Alleviating these concerns is an important part of developing the data collection program. Authority to protect these data from forced release once collected by NOAA Fisheries and the Council would help reduce the concerns of industry. Well defined limits on the release of the data could also help the agencies in developing their data sharing agreement.

Program Review

Given the novelty of the program, the Council is acutely sensitive to the need for monitoring the program's success. Under the program, NOAA Fisheries Restricted Access Management in conjunction with the State of Alaska would be directed to produce annual reports concerning the program and a preliminary report on the program at three years. A full review of the program would be undertaken at the first Council meeting in the fifth year after implementation of the program. This fifth year review would be intended to objectively measure the success of the program in addressing the concerns and achieving the goals and objectives specified in the Council's problem statement and the Magnuson-Stevens Act standards. Impacts of the program on vessel owners, captains, crew, processors, and communities would be examined. The review would include an assessment of options to mitigate negative impacts of the program. Additional reviews would be conducted every five years.

Conclusion

In recent years, participants of the BSAI crab fisheries have experience economic hardships because of stock declines and overcapitalization. The Council has worked hard to address these problems, evaluating a variety of management changes over several years. Recognizing the problem, Congress directed the Council to evaluate several different rationalization alternatives, including individual fishing quotas, processor quotas, cooperatives, and the allocation of quotas to communities. In response, the Council developed a suite of alternatives for rationalization of the BSAI crab fisheries. After thorough analysis of the options and nearly three years of discussion by industry and Council committees, the Council selected a preferred alternative for rationalization of these fisheries. The preferred alternative is a carefully crafted program that balances the interests of several identifiable groups that depend on these fisheries. The program is a "voluntary three pie cooperative" with protections to harvesters, processors, communities, and captains. The novelty of the program has compelled the Council to include several safeguards into the program, including a binding arbitration program for the

²³ Participants include harvesters, processors, communities, and crew. To the extent possible impacts on related business would also be considered.

²⁴ Persons other than the staffs of federal and state agencies directly involved in the management of the fisheries under the Council's authority and their contractors.

resolution of price disputes and extensive data collection and review programs to assess the success of the rationalization program. These safeguards, together with the Council's continuing development of the program through a series of ongoing amendments and clarifications, demonstrate the Council's commitment to a fair and equitable rationalization program, which will protect the interests of all sectors that depend on the BSAI crab fisheries.

- 2) **COUNCIL UPDATE TO CONGRESS ON BSAI CRAB RATIONALIZATION PROGRAM, MAY 6, 2003.**

North Pacific Fishery Management Council

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May 6, 2003

Dear Senators and Representatives:

In June 2002, the North Pacific Fishery Management Council, by a unanimous 11-0 vote, identified a specific rationalization program as its preferred alternative for rationalization of the Bering Sea/Aleutian Islands (BSAI) crab fisheries. The identification of a preferred rationalization program for these fisheries occurred at the behest of stakeholders and Congress, who had directed the Council to analyze several specific approaches to rationalization, as part of the Consolidated Appropriations Act of 2001 (Pub. L. No. 106-554). In August 2002, the Council provided you the requested analysis of the rationalization alternatives. At that time, the Council also informed you that it had delayed specification of certain provisions of the preferred rationalization program to allow for additional input from communities, participants, and the public. The new provisions complete identification of the “three-pie voluntary cooperative program,” the Council’s preferred alternative, for rationalizing the BSAI crab fisheries. The new provisions address several critical aspects of the program, including:

1. A **binding arbitration program** developed by a stakeholder committee, establishes a procedure that will guarantee all harvesters and processors a fair ex vessel price and at the same time reduce price disputes. This multi-stage approach includes setting a preseason fleet wide benchmark price, a period of normal price negotiations, and final offer binding arbitration for participants unable to agree on terms of delivery. The determination of the non-binding benchmark price, which would inform negotiations and binding arbitration, would utilize a process suggested by the “Steele Amendment” under which the arbiter would consider high prices from the previous season’s binding arbitration. A clarification that only independent harvesters would receive B shares (which can be delivered to any processor regardless of processing share holdings) would further strengthen the independent harvester component of the fleet.
2. A **suite of community protections** including:
 - ▶ a two-year “cooling off period” during which processing shares must be processed in the communities where processing was historically conducted.
 - ▶ a right of first refusal in processing shares granted to community and Community Development Quota (CDQ) groups to protect communities that rely on crab processing.
 - ▶ a cap on the annual allocation of processing shares in the primary fisheries, which will increase competition for landings among processors and communities in years of high total harvests, without sacrificing the stability to processors and communities provided by processing share allocations.
 - ▶ community purchase rights that permit community and CDQ groups to purchase harvest and processing shares for the benefit of a community.
 - ▶ increased harvest share ownership caps for CDQ groups to permit CDQ groups to develop a larger interest in the fisheries to benefit their communities.

3. **The details of the captain and crew share (C share) allocation** including stringent “owner-on-board requirements” to ensure that C shares benefit active captains and crew.
4. **The details of sideboards** that will prevent participants in the crab fisheries from unfairly increasing their activities in other fisheries and protect communities dependent on these other fisheries
5. **The details of a comprehensive data collection program** to provide extensive information that will allow the Council to evaluate the impacts of the program in the future.

The arbitration program is one of several critical aspects of the program. The binding arbitration program is developed to balance the interests of the harvesting and processing sectors and to minimize price disputes. The negotiation process begins with a comprehensive market analysis and announcement of a non-binding benchmark price intended to inform both price negotiations and individual binding arbitration proceedings. The market report and price announcement provide an industry-wide indicator of a reasonable price. Use of that price to guide future binding proceedings will ensure that prices in individual transactions reflect industry standards and practices. A negotiation period follows these announcements during which parties are free to agree a price for deliveries. If the parties cannot reach a successful settlement, harvesters can unilaterally initiate a binding arbitration proceeding with any processor holding uncommitted processing shares.

The Council recognizes the importance of the binding arbitration system to all participants in the fishery. Because of the importance of the arbitration program to a fair balance of interests between the sectors, several arbitration structures were analyzed and considered by the Council, including a fleet wide arbitration program and the Steele Amendment, which would apply a highest arbitrated price to all arbitrated deliveries in each fishery. The arbitration system selected by the Council is a hybrid of several systems, including the fleet wide model and the “Steele Amendment”.

If the preferred arbitration program does not function as intended, the Council is committed to using a different arbitration structure to provide a fair price setting environment. Because of the completed analyses of these different structures, an alternative structure, such as the “Steele Amendment,” could be expeditiously adopted as part of the binding arbitration program should Council review of the program suggest that the arbitration program is not working as intended. If Congress approves this program, such explicit authority could be provided to the Council to ensure timely action to address problems that might arise.

Without doubt, this rationalization program is controversial. Yet, much of this controversy is generated by the Council’s insistence on recognizing and protecting the varied interests of those that depend on the fisheries, many of which would be neglected by a less comprehensive approach. While recognizing several competing interests, the program’s foundation is a cooperative structure that provides the opportunity for participants to realize benefits through synergies and coordination. In adopting this program the Council believes these interdependencies, rather than competitive conflict, will facilitate maximum benefits from this common resource. Similar benefits have been observed in the Bering Sea Pollock fishery under the AFA cooperatives.

The Council’s preferred alternative is a novel and innovative management program. The Council intends to assume responsibility for addressing any difficulties that arise under the program and is committed to rigorous periodic reviews. The comprehensive economic data collection program demonstrates the Council’s commitment to monitor performance of all aspects of the program, including the binding arbitration program. We hope that Congressional authorization of the program will provide explicit direction to the Council concerning its obligation to review and amend the program should any unanticipated negative impacts arise.

I have enclosed the Council's update on the preferred rationalization program, which summarizes the amendments that the Council has identified since the June 2002 meeting. Congressional authorization for the program, of course, is still necessary for adoption and implementation of the program. I hope the enclosed information is useful to the United States Congress as you consider legislation affecting these fisheries. Please contact our Council, through the office of the Executive Director, if you require further information.

Sincerely,

A handwritten signature in black ink, appearing to read "David Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Benton
Chairman

**Update on Bering Sea and Aleutian Islands Crab Rationalization Program
Submitted to the U.S. Congress, April 2003**

In June 2002, the North Pacific Fishery Management Council, by a unanimous 11-0 vote, identified a specific rationalization program as its preferred alternative for rationalization of the Bering Sea/Aleutian Islands (BSAI) crab fisheries. The identification of a preferred rationalization program for these fisheries occurred at the behest of stakeholders and Congress, who had directed the Council to examine fisheries under its jurisdiction to determine whether rationalization is needed and provide an analysis of several specific approaches to rationalization, as part of the Consolidated Appropriations Act of 2001 (Pub. L. No. 106-554). In August 2002, the Council provided you the requested analysis of the rationalization alternatives. At that time, the Council also informed you that it had delayed specification of certain provisions of the preferred rationalization program to allow for additional input from communities, participants, and the public. This report is to inform you that, after receiving input from stakeholder committees and a series of meetings, the Council has completed the development of all provisions of the preferred rationalization program. This report supplements the Council's report to Congress from August 2002 by providing a brief summary of the provisions of the Council's preferred rationalization alternative selected by the Council since its June 2002 meeting.

The new provisions complete the balancing of several different interests of the preferred alternative, a "three-pie voluntary cooperative program," identified by the Council last year. While recognizing several competing interests, the program's foundation is a cooperative structure that provides the opportunity for participants to realize benefits through synergies and coordination. These interdependencies, rather than competitive conflict, will facilitate maximum benefits from this common resource.

The Council developed the preferred alternative over the course of several years. The Council appointed a broad-based stakeholder committee in December of 2000 that developed alternatives for Council consideration, including a two-pie IFQ program with regionalization, on which the preferred alternative is based. A list of committee members is included in Attachment A. After considering several draft analyses, hearing hundreds of hours of public testimony, and refining the alternatives at several meetings, the Council identified the framework and most of the details of its preferred alternative at its June 2002 meeting. At that time, the Council deferred its decisions concerning some aspects of the program to provide industry, communities, the general public and other stakeholders with further opportunity to provide input. The Council appointed committees to develop options for four different components of the rationalization program, binding arbitration, community protections, captain and crew shares, and data collection. A list of the members of the members of these committees is also included in Attachment A. At its April 2003 meeting, the North Pacific Fishery Management Council completed the process of selecting a preferred rationalization alternative for the Bering Sea/Aleutian Islands crab fisheries. Relying on input from the committees and the public and subsequent analyses, the Council developed several additional provisions including:

- several provisions to protect community interests,
- a binding arbitration program to facilitate price negotiating and to resolve price disputes,
- a program that would allocate a portion of each fishery for the exclusive use of active captains and crew,
- measures to strengthen the independent harvester component of the fleet by allocating B shares to only independent harvesters
- a set of sideboards to protect participants in other fisheries, and

- a comprehensive data collection program to aid in Council review of the program.

These measures are discussed more fully below.

Price Setting and Binding arbitration

The Council's preferred alternative provides for the allocation of both harvest and processing shares. Class A harvest shares would be allocated for 90 percent of the total allowable catch (TAC) and would require delivery to a processor holding unused processing shares. The remaining 10 percent of the TAC would be allocated as Class B harvest shares, which can be delivered to any processor. At the April meeting, the Council took action to clarify that B shares would go only to independent harvesters. This was intended to strengthen the hand of harvesters in price negotiations and promote the economic well-being of the independent harvester fleet.

Processing shares would be allocated for 90 percent of the TAC, creating a one-to-one relationship between Class A harvest shares and processing shares. The protracted season in a rationalized fishery and the one-to-one relationship of harvest shares to processing shares limit markets available to participants in both sectors. To address potential price disputes and avoid disruptive strikes, which have occurred in the past, a broad-based industry committee developed a set of options for binding arbitration. From those options, the Council selected an arbitration program that is intended to facilitate price negotiations and minimize price disputes, while providing an effective forum for resolution of any disputes.

The arbitration program would apply only to A shares, which require delivery to a holder of processing shares. The arbitration standard, supported by a consensus of the industry committee, directs the arbitrator to identify a price that preserves the historic division of first wholesale revenues between the two sectors. Industry participants supported the historical division of revenues as a fair method of preserving the balance of interests of the two sectors in the fisheries. The arbitrator would be permitted to consider other relevant factors, such as changes in product markets and prevailing prices, when applying this standard.

The price setting and arbitration system consists of three parts. The first part is the setting of a benchmark price by an independent market analyst and arbitrator. This benchmark price would inform the second step of the process which is independent price negotiations among the participants in the fishery. These would be price negotiations similar to existing practices in the fishery. If these negotiations fail, then a binding arbitration mechanism is available to resolve disputes. The Council looked on this third step as a last resort when normal negotiations fail, and the program design reflects this intent.

The first step in the price settlement process would be the development of a market report and a non-binding price formula by an industry selected market analyst and arbitrator. The Council incorporated the methodology of the "Steele Amendment" into this stage to provide more clarity and direction in this process. In this process, the arbitrator who develops this non-binding price formula would consider the outcome of the binding arbitration proceedings from the previous year. Specifically, the highest arbitration price outcomes that apply to at least 7 percent of the market would be considered (as 7 percent of the market is viewed as sufficient to demonstrate a market trend that might appropriately affect all arbitrated prices). The non-binding price formula is intended to provide a benchmark price that will be a starting point for negotiations and minimize the number of price disputes as negotiations progress. Participants are provided with latitude to settle a price that varies from the announced non-binding price to accommodate individual circumstances, such as delivery timing and location.

After a negotiating period, if normal price negotiations fail, harvesters can unilaterally initiate a binding arbitration proceeding with any holder of uncommitted processing shares by committing deliveries to that processor. The non-binding benchmark price would inform the arbitrator as to a reasonable price for deliveries. This benchmark price, which would be using the arbitration standard and considering the methodology of the so-called Steele Amendment, would not be binding but would provide a clear baseline for consideration by the arbitrator in the binding arbitration proceedings. The final arbitrated delivery price could be changed by the arbitrator to accommodate the circumstances of the transaction after considering the benchmark price and the standards for arbitration. The arbitration proceeding would be final offer, under which the arbitrator is limited to choosing between two final offers submitted, one from each party.

Recognizing the importance of the price setting process to all participants in the fishery, the Council went beyond simple binding arbitration and adopted this multi-stage approach. Because of the importance of the arbitration program to a fair balancing of interests between the sectors, several arbitration structures were analyzed and considered by the Council, including a fleet wide arbitration program and a binding form of the Steele Amendment, under which the highest arbitrated price would apply to all arbitrated deliveries in each fishery. As noted, the Council chose to incorporate this Steele Amendment process into the development of the pre-season benchmark price. If the preferred arbitration program does not function as intended, the Council is committed to using a different arbitration structure to provide a fair price setting environment. Because of the completed analyses of these different structures, an alternative structure, such as the “Steele Amendment,” could be expeditiously adopted as part of the binding arbitration program should Council review of the program suggest that the arbitration program is not working as intended.

Summary of community protection measures

The preferred rationalization program balances the interests of several communities that have depended on the Bering Sea/Aleutian Islands crab fisheries.¹ The Pribilofs depend on the crab fisheries as their economic base and could suffer from consolidation of activities in ports in the Aleutians and Alaska Peninsula that might be stimulated by slowing the race for fish. Adak is developing its crab industry after the recent departure of the military. Dutch Harbor has long depended on the crab fisheries and is home to several processors that support fleets in many fisheries. King Cove is highly dependent on a single processor active in crab and groundfish fisheries. Kodiak, historically depended on crab fisheries in the Gulf of Alaska, has maintained an interest in the more distant Bering Sea crab fisheries through its fleet and some of its processors. The community protection measures attempt to balance these competing community interests while allowing the participants to develop efficiencies in the fisheries. In assessing community interests it is important to note that the gains of one community are the losses of another community. Many of the measures are intended to provide community protections absent in a traditional harvester-only Individual Fishing Quota (IFQ) program.

The allocation of 90 percent of the TAC as Class A harvester share, which must be delivered to a holder of processing shares, is intended to support communities' historic participation by tying quota to community-based processing. The allocation of processing shares for 90 percent of the TAC is intended to provide stability for the processing sector that maintains infrastructure in communities. The remaining 10 percent of the TAC would be allocated to harvesters as open delivery shares to provide economic opportunity for harvesters and communities that wished to compete for those deliveries. The allocation scheme is similar to the 90/10 split of the AFA pollock

¹ In addition to these community level protections, processing shares and the corresponding harvest shares are regionally designated requiring landing and processing in the region of the historic processing activity.

fishery under which each cooperative is required to land 90 percent of its harvests with its affiliated processor. The AFA structure has benefited harvesters, processors, and BSAI pollock dependent communities.

A two-year “cooling off period” would be established during which processing shares cannot be relocated from the community where the historical processing occurred that led to the allocation. The “cooling off period” is intended to provide a period of general stability for processors and communities to adjust to the program. At the beginning of share-based management, trading of shares could lead to rapid consolidation in the processing sector, as some processors choose to exit the fisheries. Although trading will be permitted during the “cooling off period,” the requirement that shares stay in a community will provide communities and processors with the opportunity to work together to determine whether activity can be maintained in the community under the new management structure. This period should allow for thoughtful long range planning on the part of communities and processors.

A right of first refusal will be granted to community and Community Development Quota (CDQ) groups from communities with significant crab processing history on the sale of any processing shares for use outside of the community. The right of first refusal is a reasonable compromise reached by a committee comprised of representatives of communities, processors, and harvesters. The provision provides flexibility for companies to consolidate operations to achieve efficiencies, while providing a community and CDQ groups with a meaningful right to intervene on behalf of a community, if a local processor intends to sell its interest in the crab fisheries. A second right of first refusal would be granted to community groups from communities in the Gulf of Alaska with significant crab processing history on processing shares that are allocated based on processing history in Gulf of Alaska communities with minor processing activity in the crab fisheries. This provision is intended to aid Gulf of Alaska communities that wish to enhance their dependence on processing in the crab fisheries.

Caps on the amount of IPQs (or the annual allocation of processing shares) would be established in the two largest fisheries, the Bristol Bay red king crab and the Bering Sea *C. opilio* fisheries. In years of low abundance processor shares will provide stability to the processing sector and historically dependent communities. As stocks increase the caps will limit the allocation of processing shares providing opportunity for new processors and/or communities to participate and limits any potential windfall to historic participants. In the Bering Sea *C. opilio* fishery, the proposed 175 million pound cap was exceeded 5 times between 1990 to 2000 (slightly less than 50 percent of the seasons). Bristol Bay red king crab 20 million pound cap was exceeded 11 times in the last 33 years (33 percent of the seasons).

Community and CDQ groups would be permitted to purchase processing shares to enhance processing activity for their communities. In communities with significant history in the fisheries, these groups would be exempt from sea time requirements allowing their purchase of harvest shares. Groups would be required to manage and use the shares for the benefit of community residents. CDQ groups, who act on behalf of the many residents of their communities, would be governed by higher ownership caps than individuals purchasing shares in the fisheries. These higher caps are intended to provide CDQ groups with the latitude necessary to develop a consolidated interest in the fisheries adequate to forward the interests of residents of the Western Alaskan CDQ communities.

The details of the captain and crew share (C share) allocation

The captain and crew share program will create a separate class of shares (C shares) that will be allocated to eligible captains. This three percent allocation will require the shareholder to be onboard the vessel fishing the shares and can be transferred only to active participants in the crab fisheries. These “owner-on-board” requirements should translate into share ownership by both captains and crew. Ownership caps enacted in the

program are intended to ensure that a reasonable number of active captains and crew benefit from C share ownership.

The details of sideboards

Sideboard protections that limit participation in groundfish fisheries will apply to all vessels that receive an allocation in the *C. opilio* fishery. The sideboards will restrict these vessels to their historic harvests in all Gulf of Alaska groundfish fisheries (except the sablefish fishery, which is subject to the IFQ program harvest limitations). Vessels with minimal *C. opilio* harvests and substantial cod harvests would be exempt from the sideboard caps. In addition, vessels with minimal total groundfish landings in the qualifying period would be prohibited from harvesting cod from the Gulf of Alaska. These sideboards should be adequate to protect groundfish participants from an influx of effort because of excess vessels being removed from the crab fisheries upon implementation of the rationalization program.

The details of a comprehensive data collection program

A program to collect economic data from harvesting and processing sectors would be used to evaluate the success of the rationalization program. The program would collect revenue, employment, and variable cost data and any fixed cost data necessary to analyze variable costs. A third party entity will collect the data and provide it to analysts in a blind format to ensure confidentiality.

Conclusion

These additional provisions demonstrate the Council's continuing commitment to balance the interests of those who depend on the Bering Sea/Aleutian Islands crab fisheries. The binding arbitration program is intended to protect both harvesters and processors from failed price negotiations by providing an alternative to strikes. Community protections are intended to safeguard those communities that relied on these fisheries to support their local economies. Requirements that holders of C shares actively fish those shares will ensure that those shares protect the interests of captains and crew. Sideboards will restrict participants in the BSAI crab fisheries from increasing harvests in other fisheries to protect historic participants in those other fisheries. The data protection program will facilitate review of the program to allow the Council to mitigate any unanticipated consequences. These new provisions are an integral part of the Council's rationalization program. The program, as a whole, is a coherent management plan for these fisheries that balances the manifold interests of those who depend on these fisheries, while maintaining the environmental integrity of the fisheries demanded by the public.

Attachment A
Update of BSAI Crab Rationalization Report to Congress
Council Committees Related to Crab Rationalization

Crab Rationalization Committee

Dave Hanson – Chairman

Gordon Blue

Paula Brogdon

Tom Casey

Terry Cosgrove

John Garner

Don Giles

Leonard Hertzog

John Iani

Kevin Kaldestad

Frank Kelty

Linda Kozak

Brent Paine

Gary Painter

Joe Plesha

Dale Schwarzmiller

Jeff Steele

Jeff Stephan

Tom Suryan

Steve Minor

Arni Thompson

Karen Wood-Dibari

BSAI Crab Binding Arbitration Committee

John Garner – Co-chairman

Jake Jacobsen – Co-chairman

Gordon Blue

Lance Farr

Walt Christensen

Terry Leitzell

Garry Loncon

Gary Painter

Joe Plesha

Joe Sullivan

Attachment A (continued)
Update of BSAI Crab Rationalization Report to Congress
Council Committees Related to Crab Rationalization

BSAI Crab Community Protection Committee

Dave Hanson – Chair
Linda Freed
John Garner
Jon Hickman
Jeff Steele
Pat Carlson
Bob Juettner
Max Malevansky
Frank Kelty
Steve Minor

BSAI Crab Captain QS Committee

Stosh Anderson - Chairman
Tom Suryan
Rick Shelford
Coleman Anderson
Barney Olsen
Dan Jansen
Walter Christensen
David Hillstrand
John Klemzak
Tom Gibson
Kevin Kaldestad

BSAI Crab Data Collection Committee

John Garner - Co Chairman
Gary Painter - Co Chairman
Terry Cosgrove
Kevin Kaldestad
Terry Leitzell
Joe Plesha
Glenn Reed
Doug Wells

- 3) **CONGRESSIONAL RESEARCH SERVICE MEMORANDUM TO HONORABLE PATTY MURRAY, JULY 16, 2002.**



Memorandum

July 16, 2002

TO: Honorable Patty Murray
Attention: Anna Knudsen

FROM: Janice E. Rubin
Legislative Attorney
American Law Division

SUBJECT: Whether the Fishery Management Regime for Allocating Alaskan Crab Resources Proposed by the North Pacific Fishery Management Council Violates the Federal Antitrust Laws

This brief memorandum follows and expands upon a telephone conversation with a staff member in your office in which we were asked to review and evaluate differing assessments of the antitrust implications of a proposal for managing the Bering Sea/Aleutian Islands crab harvest. Under that proposal (greatly simplified here in the interests of time and space), put forward by the North Pacific Fishery Management Council (NPFMC or "Council") in an attempt to rationalize the issues associated with the crab harvest, including those associated with the processing of the crab harvest, individual crab fishermen would be allotted certain quotas, and directed to deliver a large proportion of those quotas to processors also subject to quotas; the proposal contemplates binding arbitration to resolve any disputes concerning the price(s) which harvesters receive from processors. In other words, NPFMC's plan would impose the quotas it proposes, obviating the ability on the part of private entities (actual or potential competitors) to agree among themselves concerning the establishment of those quotas.¹ Objections to the proposal have been raised, nevertheless, alleging that it would result in violations of the federal antitrust laws because it contemplates the kind of market division the antitrust laws prohibit. We conclude for the reasons given below that the federal antitrust laws are likely to be deemed irrelevant in the context of the subject proposal, and provide some examples of similar activity to support our conclusion.

The North Pacific Fishery Management Council was authorized in 1976 pursuant to 16 U.S.C. § 1852 (§ 301 of P.L. 94-265, (*Magnuson-Stevens*) *Fishery Conservation and*

¹ Although a complete discussion of the so-called *Noerr-Pennington* doctrine is beyond the scope of this memorandum, suffice it to say that even the concerted, anticompetitive efforts of private individuals in lobbying legislative or other governmental bodies to take actions that would violate the antitrust laws if carried out by the private entities in the absence of governmental action are immune to the antitrust laws. *Cf. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

Management Act, 16 U.S.C. §§ 1801 *et seq.*, hereinafter *Magnuson Act*), which provides for 11 voting members, to include "the principal State official with marine fishery management responsibility and expertise in each constituent State [Alaska, Washington, Oregon] ..., the regional director of the National Marine Fisheries Service [of the National Oceanic and Atmospheric Administration]....," and members appointed by the Secretary of Commerce "from a list of individuals submitted by the Governor of each applicable constituent State."² Pursuant to 16 U.S.C. § 1854, each fishery management proposal of a Council shall be transmitted to the Secretary of Commerce, who shall, after publication in the Federal Register and opportunity for public comment, "approve, disapprove, or partially approve a plan"³ According to an Opinion of the Office of Legal Counsel advising as to the status of the Councils' litigating authority, "[t]he Councils have neither express statutory authority nor that freedom from *executive control* that would give rise to some inference supportive of their having independent litigating authority," especially given that the Councils' recommendations cannot be implemented absent approval by the Secretary of Commerce.⁴ In another Opinion, the Office of Legal Counsel concluded that the facts that "the Councils were established to execute a Federal function ... [and] to assist the Secretary of Commerce in his official endeavors ... militates toward a finding that they are 'Federal Agencies' under the Federal Tort Claims Act and are protected by that degree of immunity the Constitution and the Federal statutes provide Federal agencies."⁵

When it enacted the *Magnuson Act*, Congress stated that a primary purpose was "to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States."⁶

While we are aware of no direct language to the effect that the federal antitrust laws are not applicable to the Federal Government or its agencies, there is sufficient indirect case language to establish that fact. In a landmark case in which several oil companies were charged with (and found guilty of) price fixing on account of their attempts to stabilize gasoline prices by means of removing excess supply from the market, the Supreme Court said,

[as] to knowledge or acquiescence of officers of the Federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objective sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority.⁷

In a case involving a challenge to actions of the Interstate Commerce Commission's approval of certain motor-carrier mergers, which mergers would probably have constituted violations of the antitrust laws if undertaken solely by the private carriers, the Court's language is

² 16 U.S.C. §§ 1852 (b)(1)(A), (b)(1)(B), (b)(2)(C).

³ 16 U.S.C. §§ 1854(a)-(c).

⁴ 4B Op. O.L.C. 780 (1980) (*emphasis added*).

⁵ 1 Op. O.L.C. 240 (1977).

⁶ 16 U.S.C. § 1801(b)(5).

⁷ *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 195 (1940).

instructive and not distorted by substituting "Secretary" for "Commission," "proposal" for "consolidation," and "marine management" for "transportation":

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.⁸

In a footnote to a case concerning allegations that certain labor union activities constituted a violation of the antitrust laws, the Court noted that

... clearly the law was inspired by the predatory competitive tactics of the great trusts and its primary purpose was the maintenance of the competitive system in industry.⁹

Supreme Court language in the context of its line of "state action" cases, establishing both that the federal antitrust laws are not applicable to either the states themselves, or to private individuals or entities acting either at the direction of the state or pursuant to its authorization, is also instructive. In *Parker v. Brown*, generally considered to be the seminal "state action" case, for example, the Court was reviewing the antitrust legality of a California prorate plan for the marketing of raisins. Pursuant to the plan, as set out in the California Agricultural Prorate Act, a 9-member Agricultural Prorate Advisory Commission (eight of whose members were appointed by the governor and confirmed by the State Senate, the State Director of Agriculture being the ninth member, *ex officio*)¹⁰ was given authority to grant the petition of at least 10 producers for creation of a prorate marketing plan and to approve or modify the prorate plan formulated by a Commission-appointed program committee upon making a finding that the plan was "reasonably calculated to carry out the objectives of the Act" (not at all unlike the mandates in 16 U.S.C. § 1651(a) that "[a]ny fishery management plan prepared, and any regulation promulgated to implement any such plan ... shall be consistent with [each of several enumerated] national standards for fishery conservation and management"; and in 16 U.S.C. § 1854(b)(1) that the Secretary evaluate NPFMC's proposed regulations to assure their "consistency with the fishery management plan"). The Court found no violation, emphasizing that

... it is plain that the prorate program was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command.¹¹

Even if the primary action is considered to be that of the affected private entities, given that it would be mandated (or at least authorized) by a governmental entity, the case law militates in favor of a finding of probable antitrust legitimacy. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, a case involving the wine-pricing system mandated by state statute, which required all wine producers and wholesalers to file price schedules with

⁸ *McLean Trucking Co. v. U.S.*, 321 U.S. 67, 87 (1944).

⁹ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (fn. 11) (1940) (Citations omitted).

¹⁰ The Commission at issue in *Parker* was, seemingly, not entirely dissimilar to the NPFMC.

¹¹ *Parker v. Brown*, 317 U.S. 341, 350.

the state, and which schedules were solely the products of the producers and wholesalers with no input or supervision of the state, the Court refused to grant the exemption:

The state simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules The State does not monitor market conditions or engage in any 'pointed reexamination' of the program.¹²

According to the State of Alaska, the North Pacific Fishery Management Council recognizes its "continuing obligation to review program performance ... and ... WILL make necessary adjustments to achieve stated goals and minimize unintended consequences."¹³

To summarize, NPFMC was established in a federal statute; is considered an agency of the Federal Government; its proposal (1) contemplates no private, anticompetitive action and (2) must be approved by the Secretary of Commerce before it can become effective; the federal antitrust laws are applicable neither to the federal nor state governments; and, even in the event that any private action occurs or is required, it is exempt from antitrust scrutiny if it is the product of a "clearly articulated" legislative policy and is "actively supervised" by an official entity. Although it is undoubtedly true that the quota system envisioned will result in a *de facto* division of markets for crab harvesting and processing, it is not a result, therefore, that would appear to violate the antitrust laws.

You have asked that we provide some examples of other, similar programs that have been, or are currently, in effect. The raisin prorate program created by the California Agricultural Prorate Commission has already been cited and discussed above. In addition, we note the existence of the scheme of milk marketing orders promulgated pursuant to the *Agricultural Marketing Agreement Act of 1937 (AMAA)*,¹⁴ pursuant to the policy objectives set out in 7 U.S.C. § 602, *inter alia*, in order to regulate prices in an otherwise price-disorderly market. The Supreme Court, in 1939, in *U.S. v. Rock Royal Co-op, Inc.*, recognized the Act's constitutionality (challenged as violating the Commerce Clause):

The Act authorizes and the Order [being challenged] undertakes the fixing of minimum prices for the purchase of milk 'in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce' in milk ... The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment, U.S.C.A. Const. But where commodities are bought for use beyond state lines, the sale is a part of interstate

¹² *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980) (footnotes omitted). In other words, the Court found, in order for the exemption to apply, the activity must not only be one "clearly articulated and affirmatively expressed," it must also be "actively supervised" by the state itself. 445 U.S. at 105.

¹³ Issue Papers for the Bering Sea/Aleutian Islands Crab Rationalization Program adopted by the NPFMC, June 2002.

¹⁴ 7 U.S.C. §§ 601 *et seq.*

commerce. ... Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production.¹⁵

In the course of its opinion, the Court also spoke to the issue of "lobbying" by affected entities:

If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful.¹⁶

¹⁵ 307 U.S. at 369-370 (citations omitted).

¹⁶ *Id.* at 360.

- 4) **COUNCIL LETTER TO U.S. DEPARTMENT OF JUSTICE, ANTI-TRUST DIVISION, APRIL 29, 2003.**

North Pacific Fishery Management Council

David Benton, Chairman
Chris Oliver, Executive Director



605 W 4th Ste 306
Anchorage, AK 99501-2252

Telephone: (907) 271-2809

Fax: (907) 271-2817

Visit our website: www.fakr.noaa.gov/npfmc

April 29, 2003

Mr. Roger Fones, Esq.
Chief, Transportation, Energy, and Agriculture Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Fones:

I am writing with regards to a pending antitrust analysis being prepared at the request of NOAA Fisheries and the North Pacific Fishery Management Council. In a letter dated January 9, 2003, James Walpole of NOAA General Counsel, on behalf of the Council, requested the Department of Justice, Antitrust Division to provide an opinion concerning the legality of certain aspects of a binding arbitration program under existing antitrust law. The binding arbitration program is a component of the Council's preferred management program for the Bering Sea/Aleutian Islands crab fisheries. Specifically, the Council requested an opinion concerning the potential sharing of historic price information by processors in the arbitration process. Lacking the specialized expertise to address this question, NOAA General Counsel referred the inquiry to the Department of Justice, Antitrust Division.

Our staff has had several discussions with representatives of the Antitrust Division since the initiation of their review of this question. These discussions have left us concerned about the scope of the proposed analysis, and the potential for that analysis to be misconstrued. Our request was for an analysis of the legality of certain provisions of the binding arbitration program under existing antitrust law. We have been informed that in addition to the requested legal analysis, the Antitrust Division intends to provide a 'competition advocacy letter', in essence a narrowly constructed economic analysis of market efficiency and competition relative to the proposed management program (particularly focusing on processor shares).

We respect the role of DOJ's Antitrust Division in this regard, and appreciate that such information can be very useful to agencies and the public. I note also that we had very cordial discussions with representatives from your office on this issue last week, and they acknowledged the limited context of such an analysis, and our attendant concerns in that regard. They also noted that the competition advocacy letter would be subject to several internal reviews prior to release. However, we feel compelled to comment on that analysis in advance, because once it is released, it will likely be widely distributed and widely quoted. We want to take the opportunity therefore, to provide some additional context to this issue which will not be captured in the DOJ analysis, as we understand its scope.

The Council manages its fisheries with several objectives in mind. The Council selected its preferred management program for the BSAI crab fisheries after weighing a number of related factors, many of which relate to the distributional impacts of the management program on harvesters, processors, captains and crew, and communities. An economic analysis that examines competition, but ignores these other management

objectives, is grossly inadequate for policy making. As a consequence, I think that it is important that any economic analysis presented by the Department of Justice be very explicit as to its scope. Equally important, the analysis should be explicit as to factors that are beyond its scope (i.e., distributional impacts to harvesters, processors, captains, crew, and communities). While I am confident that the DOJ analysis will contribute to the discussion of the program, I hope that the economic analysis does not overshadow the fundamental legal question we have posed. I also trust that the scope of such an economic analysis will be clear so that discussions about this program do not ignore the other, critical aspects of the program design.

Again, we respect the role of the DOJ in examination of this issue, and look forward to the pending opinion. I hope these comments are useful in the drafting of that opinion. Please feel free to contact myself, or Dr. Mark Fina on our staff, with any questions regarding these issues.

Sincerely,

Chris Oliver
Executive Director

CC: Janet Urban, DOJ
Tom Whalen, DOJ
Lisa Lindeman, NOAA GC
Senator Ted Stevens
Senator Patty Murray
Matt Paxton

- 5) **U.S. DEPARTMENT OF JUSTICE, ANTI-TRUST DIVISION LETTER TO
GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE,
AUGUST 27, 2003.**



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

R. HEWITT PATE
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (fax)
E-mail: antitrust@usdoj.gov

August 27, 2003

James R. Walpole
General Counsel
United States Department of Commerce
National Oceanic and Atmospheric Administration
Washington D.C. 20230

Dear Mr. Walpole:

You have asked for the assistance of the Department of Justice Antitrust Division ("Department") in identifying antitrust issues associated with a price arbitration system that was proposed as part of a rationalization plan to manage crab fisheries in the Bering Sea and Aleutian Islands ("BSAI").¹ The plan was developed by the North Pacific Fishery Management Council ("Council") at the request of Congress to replace the current management program.² The NOAA General Counsel's Office, Alaska Region, also has asked the Department to comment on the likely effects on competition of the entire rationalization plan. The Department submits these comments in response to your January 9, 2003 letter and NOAA's request.

¹A fishery means "(1) one or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographic, scientific, technical, recreational, or economic characteristics, or method of catch; or (2) any fishing for such stocks." 50 C.F.R. 600.10.

²The Council is one of eight Regional Fishery Management Councils established pursuant to 16 U.S.C. 1852. Its region covers the States of Alaska, Washington and Oregon, and it has authority over the fisheries in the Arctic Ocean, Bering Sea and Pacific Ocean seaward of Alaska. 16 U.S.C. 1852(a)(1)(G). The functions of the Council include preparing for the Secretary of Commerce a fishery management plan for each fishery, conducting public hearings on fishery management plans, and reviewing processing in each fishery. 16 U.S.C. 1852(h). The Council was directed by the Consolidated Appropriations Act of 2001 (Pub. L. No. 106-554) to determine whether rationalization is needed in its fisheries and to analyze individual fishing quotas, processor quotas, fishermen cooperatives and quotas held by communities.

EXECUTIVE SUMMARY

The Department supports implementation of a new fishery management plan that would end the "race to fish" inherent in the current derby-style management plan. Under the current derby-style program, the season ends as soon as the total allowable catch has been fished, producing an undesirable "race to fish" among harvesters. The race to fish is economically inefficient for both harvesting and processing and likely dangerous to the participants. The Department therefore recommends that NOAA support individual fishing quotas ("IFQ") for harvesters, a reform that will end the race to fish. Provided that IFQ are easily transferable, the gains in efficiency from ending the race to fish – reducing overcapitalization and improving safety – are likely to outweigh the harm of any loss of competition among harvesters.³ The Department recommends that the plan allow easy transferability of IFQ shares; otherwise the incentive for market participants to make efficient investment decisions will be reduced.

The Department further recommends that NOAA oppose individual processor quotas ("IPQ"), because IPQ will likely reduce beneficial competition among processors with no countervailing efficiency benefit. This lost competition could deter the development of new processed crab products, reduce the incentives for processors to make efficient investment decisions and reduce welfare for consumers of processed crab products. While harvester quotas should eliminate the harmful race to fish, processor quotas are not justified by any such beneficial competitive purpose.

If the goal of using IPQ is to compensate processors for overcapitalization, we urge NOAA to consider advocating more direct solutions, such as a program to buy excess processor equipment. We also understand that there are concerns with social goals such as preserving jobs in historic fishing villages. To the extent NOAA agrees with these goals, we recommend it consider advocating more direct solutions.

The Department also urges NOAA to oppose any form of sanctioned price arbitration. Allowing an arbitrator, rather than the market, to set price may distort the incentive of processors and harvesters to make efficient investments. Further, processors and harvesters must be cautious not to use the arbitration program as a way to agree on price with their competitors, which could violate the antitrust laws.

³ The Department of Justice has supported individual fishing quotas in the past. See, e.g. *Comments of the Department of Justice in Proposed Rulemaking: Amendment 18 to the Fishery Management Plan for Alaska Groundfish Fisheries in the Bering Strait and Aleutian Islands*, Docket No. 911215-1315 (Transferrable individual fishing rights would result in an efficient allocation of limited fishery rights.); Business Review Letter to the Pollock Conservation Cooperative, February 29, 2000 (The Department is not presently inclined to initiate an enforcement action against cooperative that allocated amongst itself the fixed quota of the BSAI pollock TAC.)

The binding arbitration proposal specifies that each processor will participate in arbitration individually and not collectively. Processors' independent participation in binding arbitration will not violate the antitrust laws. In contrast, competing processors that agree on the price they will pay harvesters would be engaged in price fixing that violates the Sherman Act. Liability cannot be avoided by having a third party arbitrator set the actual price to be paid. Similarly, competing processors that agree to use the non-binding benchmark arbitration price to set ex-vessel prices (or even as a starting point for ex-vessel price negotiations) could also be liable under the antitrust laws.

Harvesters that go beyond the contemplated arbitration program and agree among themselves to sell at the arbitrated price could violate the antitrust laws. However, harvesters would be immune under the Fishermen's Cooperative Marketing Act ("FCMA") if all participants in the arbitration are members of an eligible fishing cooperative.

Finally, the arbitration plan contemplates an exchange of competitively sensitive information which, if not handled properly, could raise antitrust concerns. Voluntary exchange of the information among competing harvesters and/or processors could violate the Sherman Act if it reduces competition. Harvesters and processors should be cautious in participating in any form of voluntary price arbitration or information exchange.

The Department's analysis here considers only the effects on competition of the proposals and whether participation in the program could result in antitrust violations. We have not considered other factors generally outside the purview of the antitrust laws, such as the social goal of protecting jobs in historic fishing villages or balancing the regulatory effects evenly among harvesters and processors. The Department is not in position to evaluate such interests. In making the ultimate recommendations, NOAA and the Council may wish to take such goals into account and balance them against the competition issues discussed here.

BACKGROUND

In developing its recommendations, the Department reviewed the rationalization plan, interviewed industry participants and examined economic research on rationalization programs. It is our understanding that the current derby-style system of fishery management works as follows: Each year, under joint management with the Council and NOAA Fisheries, the State of Alaska sets the total allowable catch ("TAC") for each fishery for the year. Once the fishing season is opened, harvesters are permitted to fish until projections determine that the TAC is reached. The fishing season is then closed. The season varies by fishery but can be very short, as little as 2 to 3 days at the fishery with the shortest season. A natural result of this system is that a "race to fish" developed, which led to over capitalization among harvesters and processors and to behavior that is dangerous to harvesters and results in less precise stock management.

In 2001, Congress directed the Council to determine whether rationalization of the fisheries under its management was needed. The Council was asked to analyze, among other things, the effects of IFQ and IPQ.

The Council detailed its proposal for rationalization of BSAI crab fisheries in its August 2002 Report to Congress and its May 6, 2003, letter to Congress.⁴ Under the proposed plan, crab harvesters would be allocated IFQ "shares" for 100% of the TAC in a fishery. Ninety percent of these shares would be Class A shares that must be processed by a processor within that fishery who holds IPQ. Ten percent would be Class B shares, which could be processed by any processor.⁵ The amount of IFQ issued to a particular harvester would be based on that harvester's historical catch in a fishery, computed over a qualifying period. IFQ shares would be fully transferable to anyone meeting certain requirements, subject to a limit on the number of shares that can be held by an IFQ holder.⁶ The shares would be leasable by any IFQ holder for the first five years of the program and thereafter leasable only within harvester cooperatives.

Similarly, processors in each rationalized fishery would be allocated IPQ shares. IPQ shares would be issued for 90% of the allocated harvest, corresponding to harvester Class A shares. The amount of IPQ issued to a particular processor would be based on that processor's historical processing activity, computed over a qualifying period. No processor would be allowed to hold more than 30% of the IPQ in its fishery. The proposed rationalization plan includes a number of community protection provisions that limit the liquidity of processor shares.

The proposal includes a plan for binding arbitration to determine the price paid by a processor to harvesters for raw crabs, the ex-vessel price,⁷ if the parties cannot reach mutually

⁴The Council plan would apply to eight fisheries, which constitute all the large Alaskan Crab fisheries.

⁵The Council also proposes creating Class C shares to distribute 3% of the TAC to fishing vessel captains. This 3% will be allocated first, with the remaining 97% of the TAC being allocated to the remaining harvesters. For the first three years fishing vessel captains may sell their catch to anyone they wish. After three years, the captains must sell 90% of their 3% to IPQ holders, and may sell the other 10% of their 3% to any processor

⁶To be eligible to purchase IFQ a person would have to be a U.S. citizen and have at least 150 days of sea time as a harvester in a U.S. fishery. Share limits vary by fishery and are between 1% and 10% of the TAC. However, various methods exist to allow IFQ holders to combine shares. For example, subject to vessel caps, more than one IFQ holder may fish off of a single boat. In addition, there is no limit to the amount of IFQ that can be controlled by a cooperative.

⁷The "ex-vessel" price is the price paid for fish offloaded directly from the fishing vessel.

agreeable terms. The Council's preferred arbitration method is a "last best offer plan" under which the arbitrator's primary goal is to set a price that preserves the historical division of revenues between harvesters and processors.⁸ The Council also proposes a pre-season, non-binding fleet-wide arbitration to develop and announce a guideline ex-vessel price for each fishery⁹ that will "inform price negotiations between the parties, as well as the Last Best Offer arbitration in the event of failed price negotiations."¹⁰

ANALYSIS

I. INDIVIDUAL FISHING QUOTAS

The current derby-style management of the crab fisheries has led to a race to fish. With the TAC fixed, harvesters must fish quickly to maximize their share of the harvest, and thus they overinvest in crew, equipment and boats, and they engage in behavior that is dangerous to harvesters and makes product management more difficult. Similarly, because the catch is spoilable, processors overcapitalize so that they can accept and process the catch in a very short amount of time. This overcapitalization by harvesters and processors is economically inefficient.

The source of the overinvestment problem for both harvesters and processors is the incentive to race for the crabs. One way to solve these kinds of problems is to create permanent property rights in the harvest, as in the proposed IFQ program. Such programs have demonstrably lengthened the harvesting season and reduced capacity in many other fisheries, for example, in the halibut and sablefish markets.¹¹

⁸Our understanding of the Council's binding arbitration proposal is based on the February 2, 2003, Council Motion on Crab Rationalization.

⁹On April 5, 2003, in a Council Motion on C-2 Crab Rationalization, the Council added the proposal for pre-season non-binding arbitration. Our understanding of the non-binding arbitration is based on the April 5, 2003 Council Motion on C-2 Crab Rationalization, the April 2003 Council *News and Notes*, and the May 6, 2003 Council letter to Congress. It is unclear from the language in those documents whether the non-binding arbitration will produce one benchmark price for all crab fisheries or whether it will produce a separate benchmark price for each fishery.

¹⁰April 5, 2003 Council Motion on C-2 Crab Rationalization. In the May 6, 2003, letter to Congress the purpose of non-binding arbitration is described as follows: "The non-binding price formula is intended to provide a benchmark price that will be a starting point for negotiations and minimize the number of price disputes as negotiations progress."

¹¹General Accounting Office, Individual Fishing Quotas (GAO-03-159, December 2002) at 20.

If the race to fish were ended, harvesters (and processors) would be left with an excess of capital investments. Endowing harvesters with tradeable shares would compensate them for these investments. Each harvester would receive a permanent property right to fish based loosely on his investment in capital. Those harvesters who leave the market could sell their shares and therefore receive compensation.¹²

The Council has proposed to allocate IFQ to harvesters based on a harvester's historical participation in a fishery. We have no reason to believe that such allocation will result in an unreasonably inefficient distribution of IFQ. If shares are made transferable, so that they could be sold or leased to more efficient harvesters, any inefficiencies in the initial distribution should be temporary.

IFQ programs have the potential to reduce capital investments below the optimal level. Ideally, a rationalization program would preserve the competition that incentivizes participants to make optimal investments and remove the incentive to overinvest. However, in a quota program, participants may inefficiently underinvest in capital, since they no longer can increase their profits by competing shares away from others. Efficiency can be preserved by creating a liquid market for quota shares. In other words, the ability to buy and sell IFQ freely guarantees that the most efficient market participants will harvest the catch. Rather than taking share from competitors, a firm buys (or leases) shares from less efficient firms, allowing the market to realize the efficiency gains. As the market for quota becomes less liquid, such as restrictions on leasing or absentee-owner provisions, inefficiencies will arise.¹³

The proposed rationalization plan has provisions limiting liquidity, such as the prohibition on leasing IFQ outside of cooperatives after the fifth year. To the extent NOAA supports goals other than economic efficiency, it should weigh those goals against the potential for reducing economic efficiency and urge that those goals be accomplished in a manner least harmful to the market.

¹²The Department offers no view on whether harvesters (or, as we discuss later, processors) should be compensated for overcapitalization, but urges NOAA to consider the effects on economic efficiency of the compensation plan. For example, auctioning the initial shares instead, which would not compensate harvesters, could improve efficiency. In addition, an auction would capture for the public some of the value from the scarce resource, which could be used for public purposes. The proceeds could, for example, be reinvested in the fisheries, used to fund conservation programs or used to partially compensate harvesters and/or processors for overcapitalization.

¹³The market would also not function efficiently if harvesters had strategic reasons for holding shares, for example to prevent entry.

II. INDIVIDUAL PROCESSOR QUOTAS

The second part of the proposed rationalization plan is to issue IPQ, which no fishery in the United States to date has implemented. Using IPQ likely will reduce competition among processors, which could discourage efficient investments, limit new product development, and undercut competition in selling processed crab products. With IFQ, any efficiency losses are balanced against efficiency gains – eliminating incentives for harvesters *and* processors to overcapitalize as well as improving stock management and safety. In contrast, there are no such IPQ benefits. Thus, we urge NOAA to oppose processor quotas, because of their anticompetitive effect, and to accomplish the program's other goals in ways that do not limit competition.

A. Effect on Competition of IPQ

1. Inefficient investment

In a market without IPQ, when a processor invests in technology to lower its costs, it can increase profits by offering harvesters a slightly higher ex-vessel price and thereby win a greater share of the catch. Under an IPQ program, the same investment may not be profitable because it will lower costs only on the processor's quota share of the market. The processor cannot earn further profits by taking share from other processors. Thus, some efficiency enhancing investments that would have been profitable in the absence of IPQ may not be made under this proposed program.

The current proposal also does not take full advantage of ways to mitigate these inefficiencies. First, the creation of Class B IFQ shares could preserve some of the investment incentives for processors. However, preserving competition for the small percentage of the harvest represented by Class B shares is unlikely to preserve fully the incentive to make optimal investments. Second, these inefficiencies could be mitigated by making the market for IPQ as liquid as possible. However, the current plan appears to impose significant restrictions on the liquidity of IPQ. We understand that many of the limitations are designed to protect the historic interests of fishing communities. NOAA and the Council should address these conflicting goals.

2. Fewer new products

IPQ could also stifle new product development. What new products might appear under different regulations is difficult to predict, but some markets changed to IFQ-only programs have developed in positive ways. For example, ending the race to fish in the halibut fisheries may have contributed to an expansion in the delivery of fresh halibut.

Market participants expect similar product innovations in processed crab. But issuing IPQ could curtail the creation of such new products. First, new entrants that might to develop new products may have difficulty acquiring IPQ, either because of the limitation imposed on their transferability or because existing processors want to deter entry. Only the 10 percent of the

market covered by Class B shares is fully available to competition. Second, some existing processors might be better positioned to create new products, but limited by their endowed IPQ and constraints on acquiring additional shares. Third, any processor's incentives to make investments in new products is limited by its endowed share of IFQ and constraints in the market for IPQ. While increasing the liquidity of IPQ could mitigate some of these concerns, we see no countervailing efficiency benefit from IPQ to justify these potential problems.

3. Less competition

Crab processors produce multiple products for different consumers using different techniques. Market participants we interviewed stated that ending the race to fish would only increase product differentiation because processors would have more time to work with the crabs. The likely result is that more of the harvest will be devoted to higher value products and that prices of these products will fall. Endowed processor shares and transferability limits might reduce this competition by altering processors' incentives to invest in capital that would lower their costs, a benefit that could be passed to consumers, or by altering product mix.

B. Arguments by IPQ Proponents

Proponents seem to make two arguments in favor of implementing IPQ. First, they argue that, if harvesters are to be endowed with IFQ to compensate them for stranded capital, then processors should also be compensated by endowing them with IPQ. They state that overcapitalized processors will bid up the ex-vessel price, shifting economic rents from processors to harvesters. In response, it is likely that overcapitalization is a short-run problem,¹⁴ and thus creating a permanent property right to compensate processors is an inefficient solution. If NOAA believes that processors should be compensated, a direct one-time buyback of capital from processors would be more desirable.

Second, IPQ proponents argue that any rationalization plan must make all participants no worse off than under the current regime. Undoubtedly, some participants will benefit from changes while others will not, but the experience of other fisheries suggests that long run winners and losers are hard to predict. For example, the GAO concluded that the halibut IFQ-only program had a varied effect on processors; some were better off and some worse off.¹⁵

¹⁴Without compensation, many processors will likely be worse off in the time it takes for processors to remove unprofitable capital from the crab markets. How quickly capital adjusts to its optimal level will depend on the ex-vessel price and the value of alternative uses of that capital.

¹⁵General Accounting Office, Individual Fishing Quotas (GAO-03-159, December 2002) at 4.

III. ARBITRATION AND INFORMATION EXCHANGE

You have specifically asked us whether the system of binding arbitration as described in the Council Motion on Crab Rationalization, dated February 2, 2003, would violate the antitrust laws if it were not legislated but instead were instituted by agreement among harvesters and processors. Below we address the legality of participating in the binding and non-binding arbitration, the economic effects of the proposed arbitration, and whether sharing the information submitted to the arbitrator among harvesters and processors could violate the antitrust laws.

Based on the documents cited in footnotes 9 and 10, we understand that the arbitration process will work as follows: Prior to the harvesting season, harvesters and processors in each crab fishery will jointly appoint a market analyst/arbitrator to review harvester and processor data and market conditions and announce a pre-season formula for setting a non-binding ex-vessel price. The stated purpose of developing a non-binding price is to guide the individual negotiations between processors and harvesters and later to guide the arbitrator in the binding arbitration process. After the non-binding price is announced, processors and harvesters may then negotiate contracts, subject to the amount of IPQ and IFQ they hold. Harvesters can make joint or individual bids. Harvesters that are unable to make a contract with a processor through negotiation may choose to use binding arbitration (or wait and later use the price that is developed in others' arbitrations). In the arbitrations that do proceed, separate and independent arbitration using a "last best offer" method is conducted for each processor.¹⁶ All harvesters who entered arbitration with a processor will receive that processor's arbitrated price.¹⁷ Harvesters who earlier waited and did not arbitrate can then choose a processor and will receive the price that was developed in the binding arbitration conducted with other harvesters.¹⁸

¹⁶If several groups of IFQ holders have matched with an IPQ holder, each may make a last best offer.

¹⁷The Council's recommended arbitration proposal charges the arbitrator with establishing a price that "preserves the historic division of revenues in the fisheries" while considering elements including current ex vessel prices; consumer and wholesale product prices for the processing sector; innovations, developments, efficiency and productivity of the different sectors; and the interest of maintaining financial health of the different sectors.

¹⁸ Of course, harvesters may choose a processor only until that processor's IPQ is filled. It is not clear how harvesters who did not arbitrate will be matched to processors with remaining IPQ. If the ex-vessel price developed in arbitration for one processor is high, there may be excess demand by harvesters to opt into this arbitrated price. How that excess demand will be rationed is unclear.

A. Legality of Participating in Arbitration

As we understand the proposed arbitration program, participation by harvesters and processors is voluntary. For a harvester and processor to independently choose to use arbitration to develop the price at which they will agree to trade crabs would not violate the antitrust laws. However, if processors agree among themselves to use arbitration or to adhere to a price developed in arbitration, that agreement likely would violate the antitrust laws. The same is true for harvesters, except that harvesters may have immunity under the FCMA. These liability and immunity questions are discussed below

1. Horizontal Agreements on Price

An agreement by a group of harvesters or processors to trade crabs at a price set by an arbitrator could be viewed as a naked agreement not to compete on price and thus an automatic or "per se" violation of Sherman Act §1, 15 U.S.C. §1. It is well established that an agreement for the purpose of "raising, depressing, fixing, pegging, or stabilizing" price is illegal per se. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).¹⁹ Even if the agreed price is set by a third party such as an arbitrator, all that matters for liability is that competitors agreed to charge that same price. In addition, liability here would extend to harvesters that agree among themselves to participate in the arbitration process and harvesters who later join that agreement by opting in once the arbitrator sets a price; they too would be fixing the ex-vessel price by agreeing with their competitors to abide by the arbitrator's decision.

Harvesters or processors may violate the antitrust law even if they agree with competitors only to use the pre-season benchmark price as a starting point for negotiations.²⁰ If ex-vessel prices were affected by the non-binding arbitration (as the rationalization plan intends), a court could reasonably infer that the non-binding arbitration was part of an illegal price fixing agreement.

¹⁹In some limited circumstances, an agreement to set price could be examined under a "rule of reason," which requires the court to "assess and balance a restraint's harms benefits and alternatives". VII Phillip E. Areeda & Herbert Hovenkamp *Antitrust Law* ¶1508a (2nd ed. 2003) For a discussion of analyzing agreements among competitors, see *Antitrust Guidelines for Collaborations Among Competitors* (Federal Trade Commission & U.S. Department of Justice, April 2000).

²⁰*Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) ("The competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most instances only as a starting point, is of no consequence. It was an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price." [footnote omitted]).

Under the proposed binding arbitration, processors will not violate the antitrust laws so long as each participates individually, as required by the Council's arbitration proposal. Harvesters will not violate the antitrust laws so long as each participates individually or as part of an FCMA cooperative.²¹

2. Antitrust immunity for fishermen's cooperatives

Harvesters can avoid antitrust liability for the conduct described above by joining a fisherman's cooperative. Under the Fishermen's Cooperative Marketing Act, 48 Stat. 1213 (1934), 15 U.S.C. §521, harvesters that join a cooperative and set prices in a manner consistent with the FCMA will be exempt from of the antitrust laws with respect to that price setting. *United States v. Maryland & Va. Milk Producers Assn.*, 362 U.S. 458, 466-467 (1960).²² However, the cooperatives participating in arbitration must include only members who are eligible for immunity under the statute; if a cooperative includes members who are not eligible for antitrust immunity under the FCMA, the entire cooperative loses its immunity. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 828-829 (1978); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 339 U.S. 384 (1967); *Hinote*, 823 F. Supp. at 1354.

a. Vertically integrated harvester-processors

An important issue is whether a harvester that is vertically integrated with a processor can be a member of an FCMA fishermen's cooperative. The Supreme Court explicitly declined to decide this issue in *National Broiler*, U.S. 436 at 828, n. 21. The *Hinote* court found that vertically integrated catfish processors were not exempt from the antitrust laws for conspiring to fix the prices of catfish products. However, the activity challenged in the case was not the processors' conduct as farmers but their conduct in selling finished catfish products. *Hinote*, 823 F. Supp. at 1358 -1359. Under *Hinote* it still is possible that a vertically integrated harvester could join an FCMA cooperative and be exempt from antitrust liability with respect to its activities as a harvester, making an agreement to set the ex-vessel price of crabs. In determining whether a vertically integrated harvester can be a cooperative member without causing a cooperative to lose its immunity, a court is likely to look at a variety of factors, including the nature of its harvester and processor activities, the extent to which its activities are integrated, and the precise nature of the challenged agreement among cooperative members. *See id.*

²¹Although processors do not have immunity under the FCMA, a processor that participates in arbitration solely as a buyer should have no antitrust liability even if a group of harvesters with whom the processor negotiates are found to have engaged in non-immune price fixing.

²²The *Maryland* case, as well as other cases concerning cooperative exemptions was decided under the Capper-Volstead Act of 1922, 42 Stat. 388 (1922), 7 U.S.C. §291 which provides for the same kinds exemptions as the FCMA. Cases decided under Capper-Volstead are precedent for cases under the FCMA. *U.S. v. Hinote*, 823 F. Supp. 1350 (S.D. Miss. 1993).

b. Agreements between cooperatives and non-members

Under the FCMA, cooperatives may not combine with non-cooperatives or "restrain trade by combining with nonexempt parties to set either resale prices for the cooperative's products or purchase prices paid to their nonmember competitors." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1508a (2nd ed. 2000) Thus, it is possible that all harvesters in a cooperative could lose their Capper-Volstead immunity if the cooperative and non-member harvesters agreed to participate in binding arbitration with the same processor.

We are unaware of any direct authority on whether a cooperative can act collectively with persons who are eligible to join but have not done so. Of course, legal immunities are narrowly construed, and antitrust immunity under the FCMA in particular has been strictly interpreted.²³ One reason that the immunity might not be read to allow agreement with non-members is that non-members are not subject to regulatory oversight. Both the FCMA and Capper-Volstead allow regulators to challenge conduct otherwise immune from the antitrust laws if the regulator believes that the price of an agricultural product is "unduly enhanced" by the activities of the cooperative.²⁴ A harvester that is not a member of a cooperative would not be subject to this oversight. Thus, it would be inconsistent with the intent of the statute to allow harvesters to enjoy the antitrust immunity afforded cooperative members.

3. Legality of information exchanges

We understand that processors and harvesters participating in binding arbitration wish to have access to all information used by the arbitrators, including information from arbitrations between other harvesters and other processors.²⁵ Thus, each harvester and processor would see the data submitted to the arbitrator by every other harvester and processor. Such exchange of competitive information could violate the antitrust laws.

²³See, e.g., *Hinote*, 423 F. Supp. at 1354 (In order to have antitrust immunity under the FCMA defendant must establish that not only was the cooperative entitled to FCMA protection, but that all entities with which defendant allegedly conspired were entitled to protection.); *Case-Swayne*, 339 U.S. at 393 (Capper-Volstead Act is a special exception to a general legislative plan and therefore Court is not justified in expanding the Act's coverage.).

²⁴The FCMA regulator is the Secretary of Commerce. 15 U.S.C. §522. The Capper-Volstead Act regulator is the Secretary of Agriculture. 7 U.S.C. §292.

²⁵The February 2, 2003, Council Motion on Crab Rationalization states "Subject to limitations of antitrust laws and the need for proprietary confidentiality, all parties to an arbitration proceeding shall have access to all information provided to the arbitrator(s) in that proceeding." We have been informed by NOAA staff and Council staff that processors and harvesters would be given data from arbitrations that they did not participate in.

Information exchanges can be procompetitive, and therefore they are not automatically illegal but are examined under a rule of reason. *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975). An agreement among competitors to exchange information can be a violation of the Sherman Act if it is found to have an anticompetitive effect. *Todd v. Exxon Corp.*, 275 F.3d 191, 198-199 (2nd Cir., 2001), even without an agreement to adhere to a particular price.²⁶

We cannot say that the transfer of any particular type of data would be benign. When price, capacity and cost data are shared among competitors, the ability to monitor a collusive agreement for "cheating" can improve significantly; thus, if the inability to monitor collusion is a significant factor in preventing an agreement, data transfers can make an agreement possible. Similarly, when firms interact repeatedly in a market, exchanges of price data can help them reach a collusive price even without an explicit agreement; thus, if processors are exchanging wholesale crab product price data, they may be able to use that exchange to reach an implicit agreement on prices for those products.²⁷

The information that would be disseminated here includes data on historical distribution of wholesale crab product revenues between harvesters and processors,²⁸ the pre-season market report (the outcome of the non-binding arbitration), other data on market prices and completed arbitrations, and data voluntarily submitted by IFQ and IPQ holders. If that data were

²⁶*United States v. Container Corp. of America*, 393 U.S. 333, 1336 (1969) ("exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit."); see also *United States v. United States Gypsum Company*, 438 U.S. 422 (1978), ("exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act").

²⁷In some cases, disseminating information to buyers and sellers can be pro-competitive if that information facilitates efficient trading. This procompetitive need for market information usually creates strong financial incentives for independent third parties to step in and provide that information. While we may be concerned that a market report could facilitate price fixing no matter who provides the information, when the competing market participants themselves organize to do it, those concerns are heightened. In the case of the market for raw crabs, the absence of third parties providing (or attempting to provide) this service currently makes us skeptical that informational problems are causing market failure; nor does the rationalization plan itself appear to create new informational problems. Finally, the benchmark price developed during non-binding arbitration does not appear to address any kind of market failure: With a stated purpose of reducing price disputes and guiding the decision of the arbitrator in the binding arbitration process, the benchmark price appears to be intended to facilitate an agreement to set prices.

²⁸February 2, 2003, Council Motion on Crab Rationalization at 4.

disseminated to processors, it could facilitate agreements to fix prices or limit capacity for processed crab products, newly developed crab products, or crabs delivered by holders of Class B shares. The shared data could also effectively suppress price competition for processed crab products even without a direct agreement. For example, if a new product is developed and processors learn each others' capacity for that product, then that knowledge could soften price competition for that product.

We have been told that some price data is already largely public, but the quality of that information is not clear.²⁹ If disseminating the data provides no new, improved or more accessible information to processors, then it likely is not problematic. However, if the exchange of data increases the quality or reliability of already public data, antitrust concerns could arise.

We were told in interviews that harvesters and processors want access to all data used by the arbitrator so that they can insure that the data is accurate. This might justify only very limited information exchanges that facilitate the arbitration process.³⁰

C. Economic Effects of the Proposed Arbitration

One likely outcome of implementing either an IFQ-only or an IFQ-IPQ program is that bargaining power of harvesters and processors in negotiating ex-vessel prices will change, resulting in a new division of the economic rents created by crab harvesting and processing. Some argue that an IFQ-only program will shift bargaining power towards harvesters. Others argue that an IFQ-IPQ program will shift it towards processors.³¹

²⁹If that data is largely "word of mouth," as we understand it is, the arbitration process could significantly improve the quality of information about prices.

³⁰The arbitration proposal does not state whether data would be disseminated as it is received by the arbitrator or only after he has announced the price. If the data submitted in a given arbitration will be disseminated to participants in that arbitration as it is received, it could serve a purpose by enabling harvesters or processors to submit "rebuttal" data. However, we see no justification for harvesters or processors seeing data from arbitrations other than the ones in which they are participating. If the data is disseminated after the arbitrator has made his decision, the absence of a right of appeal of the decision appears to mean that there is no remedy available to a harvester or processor who believes that an arbitration decision was made on the basis of incorrect data and thus no need for the data to be disseminated.

³¹Because the Council proposes endowing IFQ and IPQ, rather than selling them, we assume these endowments are designed, at least in part, to compensate market participants for overcapitalization. If issuing both IFQ and IPQ rendered IFQ worthless because all bargaining power would accrue to processors (as some believe), then the compensation scheme would fail.

The Council has made it an explicit goal of the rationalization plan to preserve the historic division of revenues between processors and harvesters, and it has chosen the binding and non-binding arbitrations as its method for preserving that division.³² Apart from the antitrust concerns, arbitration to preserve the historic division of rents has the potential to inefficiently affect processor and harvester investment decisions. For example, processors could be deterred from making efficient investments because the arbitrator may, in the name of maintaining the historic division of revenues, transfer too much of the benefits from that investment to harvesters by setting the ex-vessel price too high. Conversely, setting the ex-vessel price too low could similarly deter harvesters from making efficient investments. When the division of rents is set by market mechanisms, the optimal investment decisions are preserved. In addition, this arbitration scheme is complex and could have many unpredictable and undesirable consequences as market participants learn how the system can be manipulated. For example, market participants have an incentive to manipulate the data they submit to the arbitrator to affect the perceived historic division of revenues or to distort (in their favor) the price required to meet this goal. Thus, there is no guarantee that arbitration can even meet its stated goal of preserving the historic division of revenues.³³

CONCLUSION

The Department endorses the proposed IFQ program. The current race to fish causes overcapitalization by harvesters and processors and results in market inefficiencies, danger to harvesters and difficulty in managing the crab population. The benefits from a system of readily tradeable IFQ in eliminating these externalities are likely to outweigh any negative effects of eliminating competition among harvesters.

The Department urges NOAA to oppose IPQ. Processor shares could deter product innovation, reduce the incentive for processors to make optimal investment decisions and raise prices for processed crab products, all without countervailing efficiency benefits.

³²Because of the difficulties of measuring the division of economic rents, the Council recommends maintaining the historic division of revenues as a proxy for rents. However, some of the criteria the arbitrator is directed to consider, such as innovations and efficiencies, make it clear that the goal is to divide economic rents. BSAI Crab Rationalization Program Trailing Amendments, Community Protection Binding Arbitration, April 2002 at 21-23.

³³We do not advocate substituting regulatory rate-making for market forces. We do note, however, that where legislators have chosen to have rates set by regulation they have instituted procedural rules that allow the quality of data used by the regulator to be tested and provide a right to appeal the regulator's decision. In the case of the proposed arbitration system no such safeguards exist.

The Department urges NOAA to oppose the proposed non-binding and binding arbitration. The proposed arbitration could be used to facilitate price fixing agreements, and participants in the arbitration who are not immune from the antitrust laws because of membership in a FCMA cooperative could be in violation of those laws. Arbitration is not a substitute for market forces and may distort the incentives of processors and harvesters to make efficient investments. It is also unwieldy and complex, and thus subject to manipulation or significant error.

Based on the competition and antitrust law concerns that we have discussed, we urge NOAA to request that the Council develop a rationalization plan that does not include IPQ or arbitration.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Hewitt Pate", with a long horizontal flourish extending to the right.

R. Hewitt Pate

6) CONSOLIDATED APPROPRIATIONS ACT 2004 (Pub. Law No. 108-199)

H.R.2673

1. Consolidated Appropriations Act, 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

DEPARTMENT OF COMMERCE AND RELATED AGENCIES

DEPARTMENT OF COMMERCE

International Trade Administration

OPERATIONS AND ADMINISTRATION

(RESCISSION)

Of the appropriations made available for travel and tourism by section 210 of Public Law 108-7, \$40,000,000 are rescinded.

National Oceanic and Atmospheric Administration

COASTAL AND OCEAN ACTIVITIES

(RESCISSION)

Of the appropriations made available for coastal and ocean activities by Public Law 106-553, \$2,500,000 are rescinded.

TITLE VIII--ALASKAN FISHERIES

SEC. 801. BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION. Section 313 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), as amended, is further amended by adding at the end thereof the following:

(j) BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION-

(1) By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003. This section shall not preclude the Secretary from approving by January 1, 2005, and implementing any subsequent program amendments approved by the Council.

(2) Notwithstanding any other provision of this Act, in carrying out paragraph (1) the Secretary shall approve all parts of the Program referred to in such paragraph. Further, no part of such Program may be implemented if, as approved by the North Pacific Fishery Management Council, individual fishing quotas, processing quotas, community development quota allocation, voluntary cooperatives, binding arbitration, regional landing and processing requirements, community protections, economic data collection, or the loan program for crab fishing vessel captains and crew members, is invalidated subject to a judicial determination not subject to judicial appeal. If the Secretary determines that a processor has leveraged its

Individual Processor Quota shares to acquire a harvesters open-delivery 'B shares', the processor's Individual Processor Quota shares shall be forfeited.

`(3) Subsequent to implementation pursuant to paragraph (1), the Council may submit and the Secretary may implement changes to or repeal of conservation and management measures, including measures authorized in this section, for crab fisheries of the Bering Sea and Aleutian Islands in accordance with applicable law, including this Act as amended by this subsection, to achieve on a continuing basis the purposes identified by the Council.

`(4) The loan program referred to in paragraph (2) shall be carried out pursuant to the authority of sections 1111 and 1112 of title XI of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f, 1279g).

`(5) For purposes of implementing this section \$1,000,000 shall be made available each year until fully implemented from funds otherwise made available to the National Marine Fisheries Service for Alaska fisheries activities.

`(6) Nothing in this Act shall constitute a waiver, either express or implied, of the antitrust laws of the United States. The Secretary, in consultation with the Department of Justice and the Federal Trade Commission, shall develop and implement a mandatory information collection and review process to provide any and all information necessary for the Department of Justice and the Federal Trade Commission to determine whether any illegal acts of anti-competition, anti-trust, or price collusion have occurred among persons receiving individual processing quotas under the Program. The Secretary may revoke any individual processing quota held by any person found to have violated a provision of the antitrust laws of the United States.

`(7) An individual processing quota issued under the Program shall be considered a permit for the purposes of sections 307, 308, and 309, and may be revoked or limited at any time in accordance with this Act. Issuance of an individual processing quota under the program shall not confer any right of compensation to the holder of such individual processing quota if it is revoked or limited and shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is purchased from an individual fishing quota holder.

`(8) The restriction on the collection of economic data in section 303 shall not apply with respect to any fish processor who is eligible for, or who has received, individual processing quota under the Program. The restriction on the disclosure of information in section 402(b)(1) shall not apply when the information is used to determine eligibility for or compliance with an individual processing quota program.

`(9) The provisions of sections 308, 310, and 311 shall apply to the processing facilities and fish products of any person holding individual processing quota, and the provisions of subparagraphs (D), (E), and (L) of section 307(l) shall apply to any facility owned or controlled by a person holding individual processing quota.'

SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM. The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall: (1) provide for a set-aside of up to 5 percent for the total allowable catch of such

fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; and (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.

SEC. 803. ALEUTIAN ISLANDS FISHERIES DEVELOPMENT. (a) ALEUTIAN ISLANDS POLLOCK ALLOCATION- Effective January 1, 2004 and thereafter, the directed pollock fishery in the Aleutian Islands Subarea [AI] of the BSAI (as defined in 50 CFR 679.2) shall be allocated to the Aleut Corporation (incorporated pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)). Except with the permission of the Aleut Corporation or its authorized agent, the fishing or processing of any part of such allocation shall be prohibited by section 307 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857), subject to the penalties and sanctions under section 308 of such Act (16 U.S.C. 1858), and subject to the forfeiture of any fish harvested or processed.

(b) ELIGIBLE VESSELS- Only vessels that are 60 feet or less in length overall and have a valid fishery endorsement, or vessels that are eligible to harvest pollock under section 208 of title II of division C of Public Law 105-277, shall be eligible to form partnerships with the Aleut Corporation (or its authorized agents) to harvest the allocation under subsection (a). During the years 2004 through 2008, up to 25 percent of such allocation may be harvested by vessels 60 feet or less in length overall. During the years 2009 through 2013, up to 50 percent of such allocation may be harvested by vessels 60 feet or less in length overall. After the year 2012, 50 percent of such allocation shall be harvested by vessels 60 feet or less in length overall, and 50 percent shall be harvested by vessels eligible under such section of Public Law 105-277.

(c) GROUND FISH OPTIMUM YIELD LIMITATION- The optimum yield for groundfish in the Bering Sea and Aleutian Islands Management Area shall not exceed 2 million metric tons. For the purposes of implementing subsections (a) and (b) without adversely affecting current fishery participants, the allocation under subsection (a) may be in addition to such optimum yield during the years 2004 through 2008 upon recommendation by the North Pacific Council and approval by the Secretary of Commerce (if consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)).

(d) MANAGEMENT AND ALLOCATION- For the purposes of this section, the North Pacific Fishery Management Council shall recommend and the Secretary shall approve an allocation under subsection (a) to the Aleut Corporation for the purposes of economic development in Adak, Alaska pursuant to the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

SEC. 804. A Council or the Secretary may not consider or establish any program to allocate or issue an individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands.

This division may be cited as the 'Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004'.

- 7) **PASSAGE OF THE FY 2004 CONSOLIDATED APPROPRIATIONS
CONFERENCE REPORT REGARDING PROVISIONS RELATED TO
ALASKAN FISHERIES.**

PASSAGE OF THE FY2004 CONSOLIDATED APPROPRIATIONS CONFERENCE REPORT
REGARDING PROVISIONS RELATED TO ALASKAN FISHERIES

Mr. STEVENS. Mr. President, three years ago Congress directed the North Pacific Fishery Management Council to analyze the management of the Bering Sea Crab fisheries and determine whether rationalization was necessary. The North Pacific Council completed its study and recommended a rationalization program that recognized the historical participation in the fishery of remote Alaska fishing communities, harvesters, and processors. The "Three-pie Voluntary Cooperative Program" developed by the North Pacific Council protects the resource and ends the dangerous race for fish. Section 801 of Title VIII-Alaskan Fisheries of the FY2004 Consolidated Appropriations conference report directs the Secretary to implement the North Pacific Council's crab rationalization program in its entirety.

Section 801 amends section 313 of the Magnuson-Stevens Fishery Conservation and Management Act by adding a new subsection 313(j). Paragraph 313(j)(1) directs the Secretary to approve and implement the North Pacific Council's rationalization program for the Bering Sea/Aleutian Islands crab fisheries, including all trailing amendments. It also clarifies that the Secretary may approve and implement additional trailing amendments approved by the North Pacific Council. The Secretary must implement all parts of the crab rationalization program that were reported to Congress between June 2002 and April 2003, and all trailing amendments including those reported on May 6, 2003, no later than January 1, 2005. Any further amendments approved by the Council should be corrective in nature or address unforeseen problems with the overall functionality of the crab rationalization program. Primary elements of the Voluntary Three-pie Cooperative crab program that made three separate allocations, one to the harvest sector, one to the processing sector, and one to defined regions, should not change as this was the basis of understanding of how the crab fisheries would be rationalized in the Bering Sea and Aleutian Islands. It is imperative that the deadly and inefficient race for crab in the harsh winters months in the Bering Sea ends. Congress expects the Secretary to meet the statutory deadline of implementation of the rationalization program in time for the 2005 crab fisheries. Congress does not expect the Council to revisit particulars of the crab rationalization program that were part of the initial report to Congress in June of 2002, such as individual harvest shares, processing shares, the 90/10 split of "Class A" and "Class B" shares, regional share designations, voluntary harvester cooperatives, and community development quota allocations, to name a few.

Paragraph 313(j)(2) directs the Secretary to approve all parts of the North Pacific Council's crab program, including harvester quota, processor quota, and community protections. It also includes a non-severability clause that prevents a court from overruling only certain parts of the program. If any part of the program is found to violate the law, the entire program fails and the Bering Sea/Aleutian Islands crab

fisheries will operate under their current open-access management scheme. It also prevents processors from improperly seeking crab deliveries harvested under a harvester's open-delivery quota.

Paragraph 313(j)(3) authorizes the North Pacific Council to recommend to the Secretary any necessary changes after implementation of the crab program to continue to meet conservation and management goals set out in the program for the Bering Sea/Aleutian Islands crab fisheries.

Paragraph 313(j)(4) specifies that the loan program defined under the crab rationalization program for captains and crew be authorized pursuant to relevant sections of Title XI of the Merchant Marine Act as amended for fisheries financing and capacity reduction and for direct loan obligations for fisheries financing and capacity reduction. The loan program for crab fishing vessel captains and crew members is to be a low interest loan program similar to the loan program under the halibut and sablefish IFQ program.

Paragraph 313(j)(5) authorizes \$1,000,000 each year from funds available in the National Marine Fisheries Service account for Alaska fisheries activities to implement the program.

Paragraph 313(j)(6) specifies that the antitrust laws of the United States apply to the crab program. It requires the Secretary of Commerce to work with Department of Justice and the Federal Trade Commission to develop and implement a mandatory information collection and review process to monitor the crab program and ensure no anticompetitive acts occur among persons receiving individual processing quota. If any person receiving individual processor quota is found to have violated a provision of the antitrust laws the Secretary may revoke their processor quota share.

Paragraph 313(j)(7) requires individual processor quota share under the crab program to be considered a permit and subject to sections 307 (Prohibited Acts) and 308 and 309 (penalties and criminal offenses) of the Magnuson-Stevens Fishery Conservation and Management Act. It specifies that, like individual fishing quota, issuance of individual processor quota share does not confer any compensation right if it is revoked or limited, and does not create title or other interest in or to any fish before purchase from a harvester.

Paragraph 313(j)(8) specifies that the restriction on the collection of economic data in section 303(d)(7) of the Magnuson-Stevens Act will not apply for any processor that receives individual processing quota under the crab program. In addition, the restriction on the confidentiality of information in section 402(b)(1) will not apply when the information is used to determine eligibility or verify history for individual processing quota. This is consistent with the exception to the confidentiality of information requirement under the Magnuson-Stevens Act for verifying catch under an individual fishing quota program.

Paragraph 313(j)(9) specifies that sections 308 (civil penalties and permit sanctions), 310 (civil forfeitures), and 311 (enforcement) of the Magnuson-Stevens Act will apply to the processing facilities and

fish products of any person holding individual processing quota. In addition, to ensure compliance with the crab program it may be necessary for the Secretary to inspect a processor's facilities, therefore facilities owned or controlled by a person holding individual processing quota will be subject to the prohibited acts of section 307(1) subparagraphs (D), (E) and (L) of the Magnuson-Stevens Act.

The North Pacific Council is recognized for developing novel and innovative approaches to conservation and management of the abundant fisheries in the North Pacific. The "Three-pie Voluntary Cooperative Program" for rationalizing the Bering Sea and Aleutian Islands crab fisheries is another example of that creativity. It is the product of three years of public meetings and discussion by industry sectors, citizens and affected communities, two years of discussion and development by the North Pacific Council and its Advisory Panel, and nearly two years of extensive and thorough analysis by Council staff, with technical assistance from the National Marine Fisheries Service, Alaska Department of Fish and Game, and independent economists and fisheries consultants.

The Council meticulously constructed the crab rationalization program to achieve bold conservation and management goals for the resource; but also considered the very unique reality of a high value, capital intensive, high risk fishery that is prosecuted entirely in the distant waters of the Bering Sea and Aleutian Islands. The Council has done a great job crafting the Three-pie Voluntary Cooperative crab rationalization program and it is expected to implement the program in its entirety, including all trailing amendments, as reported to Congress in June of 2002. The Council should not revisit the particulars of the crab program, but should continue to work with the Commerce Department to ensure that the crab program is implemented in its entirety in time for the 2005 winter crab fisheries.

The Magnuson-Stevens Act requires fishery management plans and amendments to provide for the sustained participation of communities in the fisheries it has historically depended on for employment and economic opportunity. Small, isolated communities like St. Paul and St. George located on the Pribilof Islands, and Adak on the Aleutian chain have become dependent on the crab resource crossing their docks. This plan slows down the pace of the fishery, achieves efficiencies in harvesting the resource, manages and conserves the resource better, and helps decapitalize the fishery.

While there will inevitably be a degree of economic dislocation in the communities dependent on the revenues. The crab rationalization program addresses these concerns by tying the crab resource to the communities that historically processed the crab. Processor quota share is a form of community protection which maintains historical processing capacity in the communities. Processor quota share should remain in those unique, isolated communities like St. Paul, St. George, King Cove and Adak; communities completely dependent on the crab fishery, that do not benefit from multi-species processing and other economic

opportunities. The North Pacific Council determined that for the crab fisheries, processor quota share was a necessary safeguard to protect the investments made by the processing sector and more importantly, to maintain the economic benefits in the communities that have historically depended on the resource.

Section 802 of Title VIII-Alaskan Fisheries directs the Secretary in consultation with the North Pacific Fishery Management Council to establish a pilot fisheries management program that recognizes the historic participation of fishing vessels and fish processors in the central Gulf of Alaska rockfish fishery. The provision delineates the years and types of rockfish that should be considered for a pilot rationalization program to allow for increased use and value in the fishery. The pilot rockfish program will expire when the North Pacific Council authorizes a comprehensive rationalization program for Gulf of Alaska Groundfish and implemented by the Secretary, or two years from the date of implementation, whichever is earlier. The pilot program contemplates new entrants into this fishery and provides a set-aside of up to five percent of the total allowable catch of such fishery for catcher vessels not eligible to participate in the program. In addition, the five percent that is available for new entrants must come into Kodiak, Alaska for processing and can be processed by processors that have not historically participated in the fishery. The North Pacific Council will establish catch limits for nonrockfish species and non-target rockfish species currently harvested along with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which should be based on historical harvesting of such bycatch species. The Gulf of Alaska rockfish pilot program should also recognize the historic fishing and processing participation of catcher-processors that have historically participated in this fishery, and should utilize the same years and species of fish considered under the provision.

The intent of the pilot program is to consider the historic participation of all of those that have been involved in the fishery. The Gulf of Alaska rockfish pilot program does not authorize individual processing quota share for processors in this fishery. The "historic participation of fish processors" under this pilot program should be considered pursuant to the cooperative model under the American Fisheries Act, or any other manner the North Pacific Council determines is appropriate. This provision in no way authorizes individual processor quota share for the comprehensive Gulf of Alaska groundfish rationalization program that the North Pacific Council is currently developing. This pilot program is intended to allow for better conservation and management of the central Gulf of Alaska rockfish and extend the work year for processing jobs in Kodiak.

Section 803 of Title VIII-Alaskan Fisheries directs the Aleutian Islands pollock allocation to the Aleut Corporation for economic development in Adak, Alaska. If the North Pacific Council opens the Aleutian pollock fishery, the allocation of pollock for economic development in Adak will be restricted by

the prohibited acts contemplated under section 307 of the Magnuson-Stevens Fishery Conservation and Management Act and subject to the penalties and sanctions under section 308 of the Act, including the forfeiture of any fish harvested or processed. Two classes of vessels may harvest this pollock allocation: vessels that are 60 feet or less in length overall and have a valid fishery endorsement can harvest the Aleutian pollock allocation and deliver it to Adak for processing; and vessels eligible to harvest pollock under section 208 of Title II of Division C of Public Law 105-277 are permitted to form partnerships with the Aleut Corporation to harvest the Aleutian Islands pollock allocation for economic development in Adak. Section 803 does not waive the requirements of the Magnuson-Stevens Act, Endangered Species Act, National Environmental Policy Act or any other federal laws. The North Pacific Council and NMFS should be cautious in implementing section 803(a) to ensure that any reopening of a directed Aleutian Islands pollock fishery is accomplished in full compliance with all applicable law, and without disrupting 2004 groundfish fisheries which have already commenced.

In an effort to gradually establish a small boat fleet in Adak, subsection (b) of section 803 provides that during the years 2004 through 2008, up to 25 percent of the Aleutian allocation may be harvested by vessels 60 feet or less in length overall. During the years 2009 through 2013, up to 50 percent of such allocation may be harvested by vessels 60 feet or less in length overall. After the year 2012, 50 percent of such allocation shall be harvested by vessels 60 feet or less in length overall, and 50 percent shall be harvested by vessels eligible under section 208 of Title II of Division C of Public Law 105-277. Establishing a small boat fleet will be critical for the economic diversification of Adak and the revenues generated from the use of the Aleutian Islands pollock allocation will allow for greater investment opportunities in this community. For purposes of implementing this section, section 206 of the American Fisheries Act (AFA) is redefined so that the allocations in section 206(b) of the AFA should only apply to the Bering Sea portion of the directed pollock fishery.

Subsection (c) of section 803 codifies one of the longest standing conservation and management measures of the North Pacific Fishery Management Council, the 2 million metric ton cap for groundfish in the Bering Sea. The optimum yield for groundfish in the Bering Sea and Aleutians Islands Management Area shall not exceed 2 million metric tons. Upon the recommendation of the North Pacific Council and approval of the Secretary of Commerce, and only if consistent with the conservation and management goals and requirements of the Magnuson-Stevens Fishery Conservation and Management Act, the allocation of Aleutian pollock for economic development in Adak, may be in addition to the 2 million metric ton optimum yield. This treatment of the Aleutian Islands pollock allocation would only be during the 2004 through the 2008 fishing years, but only if harvests in excess of the cap do not result in overfishing and then only to the

extent necessary to accommodate a directed pollock fishery in the Aleutian Islands and should not adversely affect the current participants in the Bering Sea pollock fishery in the near term. Eventually this pollock allocation will come under the combined optimum yield for all groundfish in the Bering Sea and Aleutian Islands 2 million metric ton cap by taking proportional reductions in the total allowable catches for each of the existing groundfish fisheries as necessary to accommodate the establishment of the Aleutian Island pollock fishery.

Subsection (d) of section 803 allows the North Pacific Fishery Management Council to recommend and the Secretary to approve an allocation of Aleutian Islands pollock to the Aleut Corporation for the purposes of economic development in Adak pursuant to the requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The North Pacific Council should consider pollock allocations given to the various groups that participate in the Community Development Quota program to recommend a reasonable amount of the Aleutian Islands pollock to the Aleut Corporation for purposes of economic development in Adak and in no case should this amount exceed 40,000 metric tons.

Nothing in this section requires the North Pacific Council to open the Aleutian Islands pollock fishery. The Council should not take any action in regards to this fishery which would require a new consultation under the current biological opinion or Endangered Species Act covering Steller sea lions.

Section 804 of Title VIII—Alaskan Fisheries prohibits any Regional Fishery Management Council or the Secretary from approving any fishery management plan or plan amendments to allocate or issue individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands.

**8) SENATOR STEVENS BERING SEA/ ALEUTIAN ISLANDS CRAB
RATIONALIZATION STATEMENT.**

SENATOR STEVENS
BERING SEA/ALEUTIAN ISLANDS CRAB RATIONALIZATION
STATEMENT

_____THE BERING SEA/ALEUTIAN ISLANDS CRAB RATIONALIZATION PLAN ACCOMPLISHES TWO PRIMARY OBJECTIVES OF IMMEDIATE CONCERN: (1) CONSERVATION AND MANAGEMENT OF THE CRAB RESOURCE AND (2) ENDING THE DEADLY AND INEFFICIENT RACE FOR FISH. ALL THE PRESS ATTENTION AND MISINFORMATION ON PROCESSOR QUOTA SHARE HAS EFFECTIVELY TWISTED A FISHERY MANAGEMENT PLAN FOR ONE FISHERY IN THE BERING SEA INTO A NATIONAL DEBATE ON THE REGIONAL COUNCIL PROCESS AND U.S. FISHERY POLICY.

I FEEL AS THOUGH I MUST REMIND MY COLLEAGUES THAT THE RATIONALE BEHIND THE MAGNUSON-STEVENSON ACT WAS TO ALLOW THE VARIOUS REGIONS TO CRAFT THEIR OWN UNIQUE FISHERY MANAGEMENT PLANS TO ANSWER THE CONSERVATION AND MANAGEMENT GOALS OF THEIR LOCALITIES. THE CRAB RATIONALIZATION PLAN IS NO DIFFERENT IN THIS REGARD. THE NORTH PACIFIC COUNCIL RECOGNIZED ALL COMPONENTS OF THE CRAB FISHERY AS A BALANCED, CONNECTED SYSTEM, RATHER THAN COMPETING PARTS. THE ONLY DIFFERENCE WITH THE CRAB PLAN IS A PROCEDURAL ONE: CONGRESS SPECIFICALLY DIRECTED THE NORTH PACIFIC COUNCIL TO DEVELOP A PLAN THAT BALANCED HARVESTERS, PROCESSORS AND COMMUNITIES, AND NOW CONGRESS MUST IMPLEMENT THE COUNCIL'S PROPOSAL.

THE NORTH PACIFIC COUNCIL VOTED UNANIMOUSLY (11-0) TO RECOMMEND THIS VOLUNTARY THREE-PIE COOPERATIVE THAT RECOGNIZES INVESTMENTS MADE BY HARVESTERS, PROCESSORS AND COMMUNITIES. IT IS A PRODUCT OF EXTENSIVE ANALYSIS WITH NUMEROUS OPPORTUNITIES FOR PUBLIC COMMENT, HUNDREDS OF HOURS OF PUBLIC TESTIMONY AND AN OPEN AND TRANSPARENT PUBLIC DEBATE BY THE COUNCIL. THE ALASKA COMMUNITIES THAT ARE DEPENDENT ON THE CRAB RESOURCE BEING PROCESSED IN THEIR PLANTS ALL SUPPORT THE PLAN. THE VAST MAJORITY OF OPPOSITION HAS COME FROM A VOCAL MINORITY THAT WANT TO RECEIVE A BETTER DEAL AND ENVIRONMENTAL GROUPS THAT DO NOT WANT ANY FORM OF RATIONALIZATION AND WOULD LIKE TO LOCK UP MARINE RESOURCES. THE STATE OF

THE BERING SEA CRAB FISHERIES ARE POOR AND THE CRAB PLAN DEVELOPED THROUGH THE REGIONAL COUNCIL PROCESS NEEDS TO BE IMPLEMENTED NOW.

OPPONENTS OF THE CRAB RATIONALIZATION PLAN RAISE CONCERNS ABOUT ANTI-COMPETITIVE EFFECTS AND POTENTIAL ANTITRUST VIOLATIONS. THE CRAB PLAN IS NOT EXEMPT FROM ANTITRUST LAWS. IN FACT THE PROVISION SPECIFICALLY STATES THE SECRETARY MAY REVOKE ANY PROCESSOR QUOTA SHARE HELD BY A PERSON FOUND TO HAVE VIOLATED ANTITRUST LAWS. THE PLAN CONTEMPLATES NO PRIVATE, ANTI-COMPETITIVE ACTION AND WILL BE “ACTIVELY SUPERVISED” BY THE COUNCIL AND THE STATE OF ALASKA.

DESPITE THE FACT THE CRAB PLAN IS NOT EXEMPT FROM ANTITRUST LAWS AND WILL BE REVIEWED BY THE COUNCIL, WHICH CAN MAKE CHANGES AS NEEDED, AND THERE WILL BE A MANDATORY INFORMATION COLLECTION AND REVIEW PROCESS DEVELOPED BY THE SECRETARY OF COMMERCE AND THE DEPARTMENT OF JUSTICE TO DETERMINE WHETHER ANY ILLEGAL OR ANTI-COMPETITIVE ACTS HAVE OCCURRED, OPPONENTS STILL POINT TO AN OPINION LETTER BY THE DEPARTMENT OF JUSTICE THAT THEORIZES ABOUT “POTENTIAL” ANTI-COMPETITIVE ABUSES. NO WHERE IN THE DOJ’S OPINION LETTER DOES IT STATE THAT INDIVIDUAL PROCESSOR QUOTA SHARES VIOLATE ANTITRUST LAWS. THE DOJ OPINION LETTER RECOMMENDS THAT IPQS NOT BE USED BECAUSE THEY ARE ECONOMICALLY INEFFICIENT. HOWEVER, THE DOJ ADMITS IT “DID NOT CONSIDER FACTORS OUTSIDE THE PURVIEW OF ANTITRUST LAWS SUCH AS THE SOCIAL GOAL OF PROTECTING JOBS IN HISTORIC FISHING VILLAGES OR BALANCING THE REGULATORY EFFECTS EVENLY AMONG HARVESTERS AND PROCESSORS.”

THIS IS WHERE THE DOJ LETTER AND MOST OPPONENTS TO THE CRAB PLAN MISS THE POINT ENTIRELY. THE MAGNUSON-STEVENSONS ACT REQUIRES THE REGIONAL COUNCILS TO CONSIDER JUST THAT: “PROTECTING JOBS IN HISTORIC FISHING VILLAGES”. THIS CONSIDERATION REQUIRED BY LAW WILL ALWAYS BE ECONOMICALLY INEFFICIENT. PURSUANT TO NATIONAL STANDARD 8 UNDER THE MAGNUSON-STEVENSONS ACT, “CONSERVATION AND MANAGEMENT MEASURES SHALL 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.” (SECTION 301(A)(8) OF THE MAGNUSON-STEVENSON ACT) THE NORTH PACIFIC COUNCIL’S CRAB PLAN IS COMPLETELY CONSISTENT WITH THE GOALS OF THE MAGNUSON-STEVENSON ACT TO PROVIDE FOR THE SUSTAINED PARTICIPATION OF REMOTE COASTAL COMMUNITIES IN THE BERING SEA IN THE CRAB FISHERY AND MINIMIZE ADVERSE ECONOMIC IMPACTS ON THESE COMMUNITIES.

NEXT OPPONENTS ARGUE THAT THE CRAB PLAN IS PRECEDENT SETTING AND WILL SPREAD TO OTHER REGIONAL COUNCILS. IT IS A FISHERY MANAGEMENT PLAN FOR ONLY ONE FISHERY IN THE BERING SEA. IN FACT THE PROVISION SPECIFICALLY PROVIDES THAT “A COUNCIL OR THE SECRETARY MAY NOT CONSIDER OR ESTABLISH ANY PROGRAM TO ALLOCATE OR ISSUE AN INDIVIDUAL PROCESSING QUOTA OR PROCESSOR SHARE IN ANY FISHERY OF THE UNITED STATES OTHER THAN THE CRAB FISHERIES OF THE BERING SEA AND ALEUTIAN ISLANDS.”

THE CRAB PLAN IS NOT PRECEDENT SETTING, IT IS AN EXTENSION OF THE EFFICIENCIES AND SUCCESSES ACHIEVED UNDER THE AMERICAN FISHERIES ACT (AFA). HOWEVER, WHERE THE AFA HAS A CLOSED CLASS OF PROCESSORS THAT CAN PARTICIPATE IN THE BERING SEA POLLOCK FISHERY, THE CRAB PLAN PROVIDES AN OPEN CLASS OF PROCESSORS AND ALLOWS FOR NEW ENTRANTS IN THE PROCESSING SECTOR.

OPPONENTS OF THE CRAB PLAN HAVE ARGUED THAT PROCESSOR QUOTA SHARE IS NOT NEEDED TO MAKE THE FISHERY SAFER OR TO PROVIDE FOR PROTECTIONS OF THE COMMUNITIES. I SUGGEST THESE INDIVIDUALS VISIT THE PRIBILOF ISLANDS THAT ARE 800 MILES WEST OF ANCHORAGE, LOCATED IN THE MIDDLE OF THE BERING SEA, OR DUTCH HARBOR, IN THE MIDDLE OF JANUARY WHEN THE CRAB FISHERY IS IN FULL SWING. THESE COMMUNITIES ARE DEPENDENT ON THE CRAB RESOURCE AND HAVE MADE SUBSTANTIAL INVESTMENTS TO PROCESS RAPIDLY THE PRODUCT DURING THE MAD RACE FOR FISH IN THE CURRENT DERBY-STYLE FISHERY. THEY HAVE BECOME DEPENDENT ON THE CRAB RESOURCE CROSSING THEIR

DOCKS.

THE CRAB FISHERY IS A UNIQUE ONE IN THAT THERE IS A VERY HIGH DOLLAR VALUE FOR A SMALL AMOUNT OF RESOURCE THAT CAN BE PROCESSED QUICKLY. IF THE CRAB PLAN ONLY PROVIDED FOR HARVESTER-ONLY QUOTA SHARE IT WOULD ULTIMATELY RESULT IN DE FACTO PROCESSING QUOTA FOR THE EXCLUSIVE GROUP OF BOAT OWNERS THAT CONTROL THE HARVESTING RIGHTS TO THE RESOURCE. CURRENTLY IN THE BERING SEA CRAB FISHERY, THERE IS A SURPLUS OF CATCHER-PROCESSOR VESSELS AND FLOATING CRAB PROCESSORS THAT CAN BE LEASED OR BOUGHT CHEAPLY. THIS MOBILE PROCESSING CAPACITY IN COMBINATION WITH A HARVESTER-ONLY QUOTA SHARE WOULD ENABLE FISHERMEN TO FORM COOPERATIVES AND VERTICALLY INTEGRATE SUCH THAT NONE OF THE CRAB RESOURCE WOULD EVER HAVE TO COME SHORE-SIDE. SUBSTANTIAL INVESTMENTS MADE BY SHORE BASED PROCESSORS WOULD BE LOST AND COMMUNITIES SUCH AS UNALASKA, ADAK, SAINT PAUL, SAINT GEORGE, AKUTAN AND KING COVE WOULD LOSE OUT ON PROCESSING JOBS, TAXES AND ASSOCIATED REVENUES. THE NORTH PACIFIC COUNCIL UNDERSTOOD THIS AND DEVELOPED A PLAN THAT RECOGNIZED THE COMMITMENTS MADE BY ALL SECTORS OF THIS FISHERY AND TIED THE RESOURCE TO THE COMMUNITIES THAT HAVE HISTORICALLY PROCESSED THE CRAB.

SAFETY WILL ALSO BE ACHIEVED BY THIS CRAB PLAN AND THIS POINT IS IRREFUTABLE. THE REALITY IS IF WE DO NOT PASS THE CRAB PLAN IN ITS ENTIRETY NOW IT WILL BE MANY MORE YEARS, POSSIBLY EVEN 10 YEARS, BEFORE THE COUNCIL COULD DEVELOP ANOTHER RATIONALIZATION PROGRAM AND FULLY IMPLEMENT IT. THE NORTH PACIFIC COUNCIL IS DEVELOPING OTHER COMPREHENSIVE RATIONALIZATION PROGRAMS FOR THE GULF OF ALASKA GROUND FISH FISHERIES AND LIKELY WILL TURN TO BERING SEA NONPOLLOCK GROUND FISH FISHERIES AFTER THAT. THE COUNCIL CANNOT SIMPLY STOP WORK ON THESE OTHER PROGRAMS AND ADDRESS CRAB RATIONALIZATION AGAIN. IT WOULD BE EXTREMELY UNFAIR TO THOSE OTHER FISHERIES AND WOULD RESULT IN THOSE PROGRAMS HAVING TO BE COMPLETELY REDONE BECAUSE DATA AND FACTORS WILL INEVITABLY CHANGE CAUSING COUNCIL RECOMMENDATIONS AND CONSIDERATIONS TO BE VASTLY DIFFERENT. IF THE CRAB

PLAN DOES NOT MOVE FORWARD IN ITS ENTIRETY THE DEADLY RACE FOR FISH WILL CONTINUE.

IN CLOSING I BELIEVE SOME HARSH REALITIES ABOUT THE BERING SEA CRAB FISHERY WILL ILLUSTRATE WHY WE MUST IMPLEMENT THIS PROVISION IMMEDIATELY. THE BERING SEA/ALEUTIAN ISLANDS CRAB FISHERY IS RATED THE MOST DANGEROUS OCCUPATION IN THE U.S. FROM 1990 TO 2001, THERE WERE 61 FATALITIES AND 25 VESSELS WERE LOST; AND IN THE RECENT OCTOBER 2003 RED KING CRAB FISHERY, BOATS WERE LOST AND A PERSON KILLED. THIS PAST OCTOBER CRAB FISHERY WAS ONE OF THE WORST WEATHER-WISE EVER, WITH NEARLY CONSTANT GALE FORCE WINDS AND HUGE OCEAN SWELLS. UNDER THE CRAB PLAN FISHERMEN COULD HAVE CHOSEN TO WAIT UNTIL THE WEATHER CLEARED.

CONDITIONS ARE EVEN MORE EXTREME DURING THE WINTER CRAB FISHERY IN THE BERING SEA WHEN IT IS ALMOST ALWAYS DARK, EXTREMELY COLD AND THE SEAS SEND FREEZING OCEAN SPRAY THAT ICE DOWN THE CRAB VESSELS. THE DERBY-STYLE FISHERY REQUIRES DECKHANDS TO WORK ALL DAY AND ALL NIGHT, OUTSIDE ON ICY DECKS, IN ROLLING 10 TO 20 FOOT SEAS, RETRIEVING 700-POUND STEEL POTS, SORTING CRAB AND THEN DROPPING THE POTS IN NEW PLACES.

OBVIOUSLY, THIS IS VERY DANGEROUS, BUT IT IS ALSO VERY INEFFICIENT AND DAMAGING TO THE RESOURCE. THE BOATS ARE RACING TO HARVEST THE CRAB BEFORE THE GUIDELINE HARVEST LEVELS ARE REACHED WHICH REQUIRES THEM TO PULL THEIR POTS EARLY NOT ALLOWING THEM TO "SOAK" LONGER PERMITTING YOUNGER CRABS TO ESCAPE. THE RESULT IS THE YOUNGER CRABS ARE UNNECESSARILY KILLED CAUSING THE STOCKS TO SUFFER.

IF WE DO NOT IMPLEMENT THIS PROVISION LIVES WILL CONTINUE TO BE LOST AND THE RESOURCE AND THE ENVIRONMENT WILL SUFFER. THE OPPOSITION OF A VOCAL FEW THAT BELIEVE THEY DESERVE A BETTER DEAL AND ENVIRONMENTAL GROUPS THAT WANT TO TURN THE WATERS IN THE NORTH PACIFIC IN TO VAST MARINE RESERVES OR "NO TAKE ZONES" ARE BEHIND THE OPPOSITION TO CRAB RATIONALIZATION. THEIR ATTACKS ARE SHAMEFUL, SELF RIGHTEOUS AND DISINGENUOUS. WE HAVE AN OBLIGATION TO PROTECT THE CRAB RESOURCE

IN THE BERING SEA AND PREVENT ANY FURTHER LOSS OF LIFE IN THIS FISHERY. THIS IS EXACTLY WHAT CRAB RATIONALIZATION WILL ACHIEVE AND TO ARGUE ANYTHING ELSE IS JUST NOT TRUE.

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