

SECRETARIAL REVIEW DRAFT

REGULATORY IMPACT REVIEW FINAL ENVIRONMENTAL ASSESSMENT INITIAL REGULATORY FLEXIBILITY ANALYSIS

For proposed

Amendment 21

To the Fishery Management Plan for

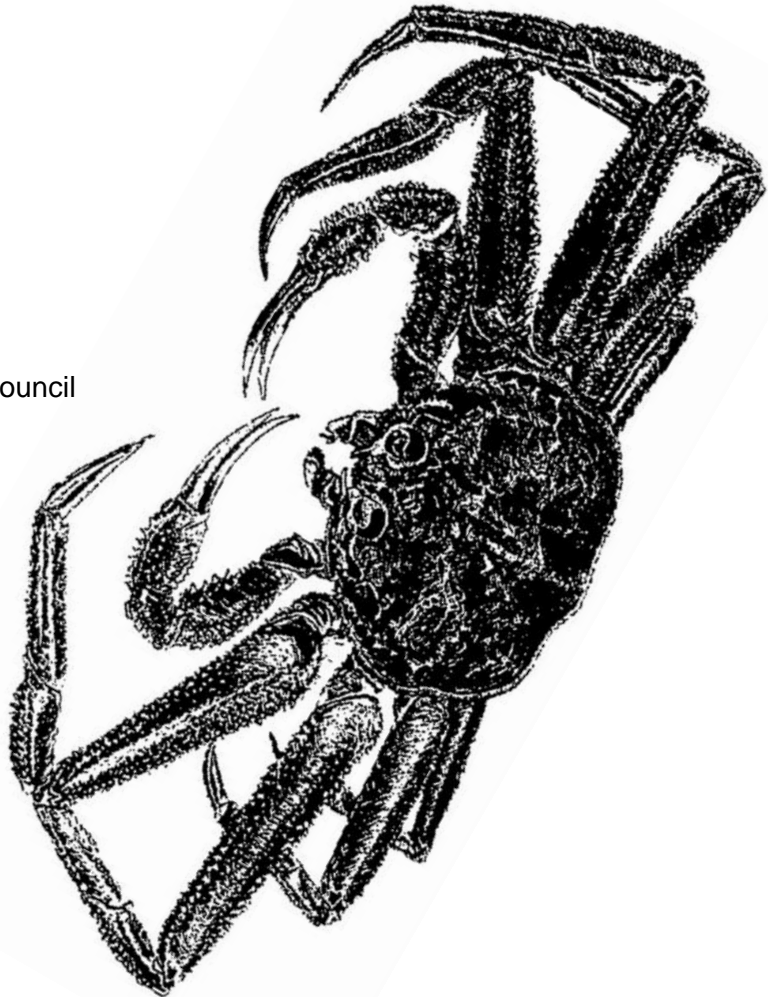
Bering Sea and Aleutian Islands King and Tanner Crabs

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EXECUTIVE SUMMARY

In August of 2005, fishing began under the Crab Rationalization Program (Program) for the Bering Sea and Aleutian Islands (BSAI) crab fisheries, developed by the North Pacific Fishery Management Council (the Council). Under the Program, NMFS issued harvesters quota share (QS) that yield annual individual fishing quota (IFQ), that embody a privilege to harvest a portion of the total allowable catch (TAC). Ninety percent of the IFQ issued are “Class A” IFQ, the harvest from which must be delivered to the holder of unused individual processor quota (IPQ). NMFS issued processor quota share (PQS) to processors that yield individual processing quota, that embody a privilege to receive and process a portion of the TAC harvested with Class A IFQ. A one-to-one relationship exists between Class A IFQ and IPQ. The Council also included an arbitration system in the Program, to facilitate the resolution of the terms of delivery (including price), in the event that holders of Class A IFQ and IPQ are unable to negotiate those terms.

Under the arbitration system, after a date certain, harvesters that are not affiliated with a processor through ownership or control linkages (i.e., unaffiliated harvesters) would be permitted to unilaterally commit delivery of harvests from Class A IFQ to a processor with available IPQ. Once committed, the IFQ holder would be permitted to initiate a binding arbitration proceeding, if the parties are unable to agree to the terms of delivery. Under the current rule, arbitration must be initiated at least 15 days prior to a season opening.

Under the current schedule for stock assessments and TAC setting, IFQ and IPQ are typically not issued more than 15 days prior to a season opening, limiting the ability of IFQ holders to rely on the arbitration system. Although participants may voluntarily agree to extend the deadline for initiating arbitration, the current timeline does not reliably provide IFQ holders with the ability to use the arbitration system as intended.

Alternatives

This action would link the timing for initiating an arbitration proceeding to the issuance of IFQ and IPQ, providing participants with a reasonable and reliable opportunity to use the arbitration system. Two alternatives that address this issue (plus the status quo) are analyzed in this document:

- 1) No action. Arbitration would be required to be initiated between 25 days and 15 days prior to a season start;
- 2) Arbitration would be required to be initiated between 5 days and 15 days after issuance of IFQ and IPQ (10-day period for arbitration initiation after allowing a 5-day period after the issuance for negotiation of agreements) (**the preferred alternative**); or
- 3) Arbitration would be required to be initiated within 10 days after issuance of IFQ and IPQ (10-day period for arbitration initiation immediately after issuance of IFQ and IPQ).

Social and Economic Effects of the Alternatives

The status quo has revealed inconsistencies in management of the BSAI crab fisheries that would prevent harvesters from initiating binding arbitration proceedings in accordance with the timeline for that process, precluding the use of the arbitration system as intended under the Program. Participants have used the arbitration system through both IFQ holders and IPQ holders consenting to a “lengthy season approach,” under which arbitration is delayed until an agreed upon time.¹ This delay, however, could impact

¹ The regulations at 50 CFR 680.20(h)(3)(iii) provide for the use of the “lengthy season approach”.

operational certainty for some participants. In addition to operational effects themselves, some negotiating leverage could shift to entities that are more able to manage that operational uncertainty.

Alternatives 2 and 3 modify the timeline in a manner that would allow IFQ holders that have committed shares to an IPQ holder to timely commence an arbitration proceeding. By modifying the timeline, both of these alternatives address the shortcoming in the status quo alternative. Under both alternatives, an arbitration proceeding would be completed on or about the opening of the season, limiting the adverse effects of operational uncertainty arising under the status quo. The difference between these two alternatives is that Alternative 2 (the preferred alternative) provides an assessment period for negotiated IFQ commitments, preceding the period during which IFQ holders can unilateral commit IFQ to a holder of uncommitted IPQ. This period could delay the conclusion of arbitration proceedings slightly in comparison to Alternative 3, but could also contribute to stability in the process, and stability in harvester/processor relationships, by prioritizing negotiated commitments.

Effects on Administration, Management, and Enforcement

Although Alternatives 2 and 3 modify the timing of arbitration proceedings from the status quo, each alternative simply resolves an unanticipated conflict with the schedule for issuance of IFQ and IPQ that depend on the stock assessment and TAC setting processes. Neither alternative is expected to have any impact on administration, management, and enforcement.

Effects on the Biological and Physical Environment

The alternatives concern only the timing of procedures to negotiate disputed price and delivery terms, and do not affect the timing of fishing activities. None of the alternatives under consideration effect BSAI crab stocks or any other components of physical or biological environment not already considered in the EIS prepared for the Program.

Table of Contents

| | |
|--|----|
| EXECUTIVE SUMMARY | i |
| Alternatives | i |
| Social and Economic Effects of the Alternatives..... | i |
| Effects on Administration, Management, and Enforcement..... | ii |
| Effects on the Biological and Physical Environment..... | ii |
| 1.0 Introduction..... | 1 |
| 2.0 Regulatory Impact Review | 1 |
| 2.1 Problem Statement..... | 2 |
| 2.2 Background..... | 2 |
| 2.3 Description of the Alternatives..... | 3 |
| 2.4 Existing Conditions of Timing Aspects of the Arbitration System..... | 4 |
| 2.5 Analysis of Alternatives | 8 |
| 2.6 Summary of Net Benefits to the Nation | 11 |
| 3.0 Environmental Assessment..... | 12 |
| 3.1 Purpose and Need | 12 |
| 3.2 The Alternatives | 13 |
| 3.3 Affected Environment | 14 |
| 3.4 Analysis of the Alternatives | 15 |
| 3.4.1 Effects on Administration, Management, and Enforcement | 15 |
| 3.4.2 Effects on the Physical and Biological Environment..... | 15 |
| 3.4.3 Effects on the Social and Economic Environment..... | 16 |
| 3.4.4 Cumulative Effects..... | 17 |
| 4.0 Regulatory Flexibility Analysis | 17 |
| 4.1 Definition of a Small Entity..... | 18 |
| 4.2 A description of the reasons why action by the agency is being considered..... | 20 |
| 4.3 The objectives of, and the legal basis for, the proposed rule..... | 20 |
| 4.4 A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply..... | 20 |
| 4.5 A description of the projected reporting, recordkeeping, and other compliance requirements | 21 |
| 4.6 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule | 21 |
| 4.7 A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities | 21 |
| 5.0 National Standards and Fishery Impact Statement | 23 |
| 5.1 National Standards..... | 23 |
| 5.2 Section 303(a)(9) – Fisheries Impact Statement..... | 25 |
| 6.0 References..... | 25 |
| 7.0 List of Preparers and Persons Consulted..... | 25 |

List of Tables

| | |
|---|---|
| Table 1. Timing of season opening, deadline for initiation of arbitration, TAC announcement, and IFQ and IPQ issuance under the current schedule..... | 7 |
|---|---|

List of Figures

| | |
|--|----|
| Figure 1. Alternative 2 - Timing share matching and initiation of arbitration from the issuance of IFQ and IPQ (with a 5-day assessment period)..... | 9 |
| Figure 2. Alternative 3 - Timing share matching and initiation of arbitration from the issuance of IFQ and IPQ (without a 5-day assessment period). | 10 |

1.0 INTRODUCTION

In January 2004, the U.S. Congress amended Section 313(j) of the Magnuson-Stevens Act to mandate the Secretary of Commerce implement the Crab Rationalization Program (the Program) for the Bering Sea and Aleutian Islands (BSAI) crab fisheries, developed by the North Pacific Fishery Management Council (the Council) in motions from June 2002 to April 2003. The Program adopted by the Council includes specific provisions to establish an arbitration system to settle price and other disputes that may arise between harvesters and processors. The Council adopted the Program through Amendments 18 and 19 to the BSAI King and Tanner Crab Fishery Management Plan (FMP). Congress mandated that the arbitration system provisions adopted by the Council in Amendments 18 and 19, be approved by the Secretary of Commerce by December 1, 2004, and subsequently implemented through regulation (Pub. L. 108-199). In response to this mandate, NMFS approved Amendments 18 and 19 on November 19, 2004, and published a final rule to implement the amendments on March 2, 2005 (70 FR 10174). NMFS also published two corrections to the final rule (70 FR 13097; March 18, 2005) and (70 FR 33390; June 8, 2005).

Management actions for these crab fisheries must comply with applicable Federal laws and regulations. Although several laws and regulations guide this action, the principal laws and regulations that govern this action are the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the National Environmental Policy Act (NEPA), the Regulatory Flexibility Act (RFA), and Executive Order 12866.

This document contains a Regulatory Impact Review (RIR), an Environmental Assessment (EA), and an Initial Regulatory Flexibility Analysis (IRFA) of alternatives to amend the timing of certain elements of the arbitration system established by the Program. Section 2 contains the Regulatory Impact Analysis; Section 3 contains the EA; Section 4 contains IRFA; and Section 5 contains a brief discussion of the Magnuson-Stevens Act National Standards and a fishery impact statement.

This document relies heavily on the information and analysis contained in the Bering Sea Aleutian Islands Crab Fisheries Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/Social Impact Assessment (NMFS/NPFMC, 2004). Throughout this analysis, that document is referred to as the "Crab EIS". Additional information concerning the arbitration system, its management under the Crab Rationalization Program, and its impacts on the human environment are contained in that document.

2.0 REGULATORY IMPACT REVIEW

This chapter provides an economic analysis of the action, addressing the requirements of Presidential Executive Order 12866 (E.O. 12866), which requires a cost and benefit analysis of Federal regulatory actions.

The requirements of E.O. 12866 (58 FR 51735; October 4, 1993) are summarized in the following statement from the order:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches

agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

E.O. 12866 further requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant”. A “significant regulatory action” is one that is likely to:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

2.1 Problem Statement

The Council has developed the following problem statement defining its purpose for revising the timing of the arbitration system:

The Council developed the arbitration system to provide a mechanism to resolve price disputes between harvesters and processors participating in the Bering Sea and Aleutian Islands (BSAI) crab fisheries. The effectiveness of the arbitration system is essential to the realization and equitable distribution of benefits under the rationalization program developed by the Council for the BSAI crab fisheries. As currently formulated, harvesters and processors are unable use the process for share matching and initiation of arbitration proceedings under of the arbitration system, because the timing specified for that process is inconsistent with the existing schedule for stock assessment, TAC determination, issuance of IFQ and IPQ for the fisheries, and the seasonal opening of the fisheries. Specifically, regulations currently specify the timeline for the arbitration system (and the timing of share matching and initiation of arbitration proceedings) relative to the season opening. The timing of the issuance of IFQ and IPQ for the fisheries, however, prevents participants from share matching and initiating arbitration within the specified time periods.

The Council directed staff to develop alternative timing structures for the share matching and initiation of arbitration that substantially maintain the timing and overall effect intended in the original timelines established in the Program. The alternatives should constitute mechanical responses to an administrative timing issue. As such, this action would address an administrative timing conflict and provide for the effective implementation of the arbitration system of the Program.

2.2 Background

In January 2004, the U.S. Congress amended Section 313(j) of the Magnuson-Stevens Act to mandate the Secretary of Commerce implement the Crab Rationalization Program for the Bering Sea and Aleutian Islands crab fisheries, developed by the Council in motions from June 2002 to April 2003. On March 2, 2005, the Secretary issued regulations to establish the Crab Rationalization Program (70 FR 10174). Crab fishing began under this Program on August 15, 2005.

Under the Crab Rationalization Program, NMFS allocated quota shares (QS) in each crab fishery to harvesters, based on their historic catch. Individual Fishing Quota (IFQ), in total an amount equal to the TAC in the fishery, is issued annually to the holders of QS in proportion to their respective QS holdings in the fishery. So, QS represent the privilege to receive an annual allocation of IFQ that entitle the holder to harvest a certain portion of the annual TAC from the applicable fishery. Ninety percent of the IFQ allocated is designated as “Class A” IFQ, and must be delivered to a processor that holds individual processor quota (IPQ). Similar to harvesters, NMFS allocated to processors processor quota shares (PQS) based on their historic processing. PQS represent the privilege to receive a portion of the annual pool of IPQ in a fishery. IPQ is issued for 90 percent of the TAC in each fishery and is distributed to PQS holders in proportion their PQS holdings. In part because of the one-to-one correspondence of Class A IFQ to IPQ, the Council developed an arbitration program to resolve disputes concerning price and terms of delivery for landings between harvesters and processors.

The Program allows harvesters that are not affiliated with a processor through ownership or control linkages (unaffiliated harvesters) to unilaterally match their Class A IFQ with available IPQ, and to enter into a binding arbitration proceeding, if the unaffiliated harvester and processor cannot agree on price or other delivery terms. Under the arbitration system, each party would submit a last best offer. The arbitrator would be limited to selecting from these two offers. The specific timing of share matching and the binding arbitration process is specified in the Fishery Management Plan for BSAI King and Tanner Crabs (FMP). Any change to this timing schedule requires an FMP amendment.

As described in the purpose and need statement, harvesters and processors are unable to use the share matching and binding arbitration process, under the existing schedule for issuance of harvesting and processing shares and the season opening of the fisheries. Specifically, regulations currently specify the timeline for the arbitration system (and the timing of share matching and initiation of arbitration proceedings) relative to the season opening. The timing of the issuance of IFQ and IPQ for the fisheries, however, prevents participants from share matching and initiating arbitration within the specified time periods. The delay for issuing IFQ and IPQ arises because of the need for annual survey data to be incorporated into the annual stock assessment and TAC setting processes. The timing of the survey and time needed for processing those data for stock assessments and TAC setting cannot be changed.

Under the status quo, the share matching process and the initiation of binding arbitration proceedings have not occurred as described in the Crab EIS or regulations. Instead, IFQ holders and IPQ holders have consensually agreed to allow added time for share matching and initiation of arbitration under the “lengthy season approach” to arbitration.² Under the lengthy season approach, participants may agree to delay the arbitration process beyond the regulatory deadlines. The result is that participants have (to some extent) accommodated the shortcoming of the existing regulatory timeline. Unless the shortcoming in timing schedule is rectified, it is possible that at some point in the future participants could be prevented from using the arbitration process as intended.

2.3 Description of the Alternatives

Based on the Council’s guidance, staff analyzed the following three alternatives for the management of the share matching and binding arbitration processes:

- 1) No action. The timing for share matching and initiation of binding arbitration is based on the season start date for a crab fishery. Under this alternative, holders of uncommitted Class A IFQ and holders of uncommitted IPQ may voluntarily agree to commit their respective shares at any time. Beginning 25 days prior to a season opening, holders of uncommitted Class A

² The regulations at 50 CFR 680.20(h)(3)(iii) provide for the use of the “lengthy season approach”.

IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. At any time between 25 days and 15 days prior to the season opening, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration at least 10 days prior to the season opening, if last best offers are submitted more than 15 days prior to the season opening, or, otherwise, within 5 days of the submission of the last best offers.

- 2) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (including a 5-day assessment period for negotiated commitments). **(the preferred alternative)** For a period of 5 days after the issuance of IFQ and IPQ (the assessment period), holders of Class A IFQ and holders of IPQ may voluntarily agree to commit their respective shares. After this 5-day assessment period, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period beginning 5 days after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.
- 3) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (without a 5-day assessment period for negotiated commitments). After the issuance of IFQ and IPQ, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.

Under the status quo, the decision to enter into a binding arbitration proceeding is made by an unaffiliated harvester.³ Neither alternative to the status quo would affect that aspect of the arbitration process. Neither alternative would significantly modify the contractual obligations of the parties in the arbitration system, except to the extent that the change in timing accommodates share matching and initiation of the arbitration proceedings.

2.4 Existing Conditions of Timing Aspects of the Arbitration System

The provisions in the FMP that address the arbitration system were developed by the Council and adopted through Amendments 18 and 19 to the FMP. Most of the provisions that address the arbitration system were adopted by the Council through Amendment 19 to the FMP. The EIS contains an extensive discussion on the arbitration system, the share matching component, and binding arbitration component. This discussion is contained primarily in the RIR/IRFA of the EIS, Appendix 1 of that document. The FMP details the timing of matching IFQ and IPQ, and initiation of binding arbitration, if negotiations are unsuccessful in resolving all terms of delivery. The regulations promulgated by NMFS provide, in part:

³ Under all of the alternatives, arbitration is available only to IFQ holders that are not under common ownership or control with an IPQ holder. For purposes of this analysis, IFQ holders without common ownership or control with an IPQ holder are referred to as “unaffiliated harvesters”.

Open Negotiations.

At any time prior to the date of the first crab fishing season of a crab fishing year for that crab QS fishery, any holder of uncommitted Arbitration IFQ may negotiate with any holder of uncommitted IPQ, the price and delivery terms for that season for any IFQ and uncommitted IPQ (50 CFR 680.20(h)(3)(ii)).⁴

This provision is intended to provide IFQ holders and IPQ holders with the opportunity to reach a consensual agreement concerning the commitment of their shares at any time.

The FMP states:

Required Share-Matching and Arbitration.

Beginning at the 25-day pre-season point, IFQ holders may match up IFQ shares not already subject to contracts with any IPQ shares not under contract, either as collective groups of IFQ holders or as individual IFQ holders (the offered IFQ Shares must be a substantial amount of the IFQ Holder(s)' uncontracted shares). The IPQ holder must accept all proposed matches up to its non-contracted IPQ share amount. All IFQ holders "matched" with an IPQ holder will jointly choose an arbitrator with that IPQ holder. The matched share holders are committed to the arbitration once the arbitrator is chosen (if the parties wish, the arbitrator may initially act as a mediator to reach an agreement quickly). Arbitration must begin no later than 15 days before the season opening date.

NMFS implemented the Council's recommendation into regulation under 50 CFR 680.20(h)(3)(iv) and (v). With respect to matching Class A IFQ to IPQ, those regulations state:

(iv) Share Matching.

(A) At any time after the issuance of IFQ and IPQ for a crab QS fishery but not earlier than 25 days prior to the first crab fishing season for a crab QS fishery in the crab fishing year, holders of uncommitted Arbitration IFQ may choose to commit the delivery of harvests of crab to be made with that uncommitted Arbitration IFQ to an uncommitted IPQ holder.

This provision allows harvesters who (1) are not affiliated with a PQS or IPQ holder and (2) holding Class A IFQ that are not committed to a processor holding corresponding IPQ, to unilaterally match their shares with a processor that has IPQ that has not yet been matched with a harvester.

The regulations go on to provide the following, with respect to the initiation of binding arbitration proceedings:

(v) Initiation of Binding Arbitration.

If an Arbitration IFQ holder intends to initiate Binding Arbitration, the Arbitration IFQ holder must initiate the Binding Arbitration procedure between 25 days and 15 days prior to the date of the first crab fishing season for a crab QS fishery.

Under this provision, a harvester that has committed Class A IFQ for delivery to a processor may initiate a binding arbitration proceeding no sooner than 25 days prior to a season opening, and not later than 15 days before the start of the season.

⁴ "Arbitration IFQ" are IFQ held by an unaffiliated harvester, the terms of delivery for which may be subject to arbitration.

Under this structure, the arbitration process begins with a period of voluntary matching of shares, during which holders of Class A IFQ and holders of IPQ agree to the delivery and acceptance of landings using those shares. These agreements may not establish all terms of delivery, in which case the IFQ holder can later resort to binding arbitration. Following the period of consensual matching of shares is a period during which holders of uncommitted Class A IFQ can unilaterally commit to deliver landings to any holder of uncommitted IPQ. After this commitment of shares, the parties can either agree to the terms of delivery or the IFQ holder can resort to binding arbitration.⁵ Binding arbitration can only be initiated by the IFQ holder. Once initiated, the timing of the proceeding (including the submission of last best offers to the arbitrator) is determined, after a meeting with the arbitrator. The arbitrator is required to make a decision on the later of (1) 10 days prior to the season opening, or (2) 5 days after the submission of last best offers.

The Timing Conflict – Stock Assessment, Quota Issuance, Regulatory Timing, and Binding Arbitration

Stock Assessment and TAC announcements for fisheries other than the Aleutian Islands king crab fisheries

Each year, the State of Alaska Department of Fish and Game (ADF&G) establishes a total allowable catch (TAC) for BSAI crab, through a collaborative process with NMFS. ADF&G considers the most recent and best available scientific data when determining the TAC for a fishery. Since the process differs in the Aleutian Islands golden king crab fisheries from other fisheries managed under the Program, the discussion of the different fisheries is separated. For fisheries other than the Aleutian Islands king crab fisheries, trawl stock surveys that are conducted on an annual basis by NMFS are a critical component of the stock assessment and TAC setting process. In these fisheries, NMFS conducts its stock assessment surveys in summer, typically starting in late May and concluding in late July or early August. Although surveys are concluded in the summer, the process of analyzing the summer NMFS survey data, fishery dependent data, and model results, as well as error checking those analyses, extends into the fall. Typically, NMFS crab stock survey data become available for analysis between mid-August and mid-September. Following those data becoming available, NMFS and ADF&G analysts perform stock assessment analyses and estimation of stock abundance, as needed for determination of stock status relative to overfishing and TACs. ADF&G has determined that announcement of TACs will occur on October 1. That TAC announcement timing is intended to allow for the most thorough review possible of the data by ADF&G and NMFS, for review of the status of the stocks relative to overfishing by the Crab Plan Team prior to the TAC determinations by the State, and for release of the IFQs and IPQs by NMFS prior to the October 15th season opening. Accelerating the timing of the TAC announcement could compromise the integrity of the results, introduce additional errors, and limit the ability of ADG&G and NMFS to use the most recent and best available data.

Stock assessments and TAC announcements for Aleutian Islands golden king crab fisheries

Aleutian Islands king crab are not assessed using the NMFS trawl surveys. ADF&G uses alternative methodologies to assess stock abundance in these fisheries – much of it from data gathered during the prior year's fishery, which does not officially close until mid-May. ADF&G has determined that the formal announcement of TACs in the Aleutian Island golden king crab fishery will occur by August 1st, 15 days prior to the August 15th opening.

Quota Issuance

Once ADF&G announces the TAC, NMFS must issue IFQ to harvesters, based on their holdings of quota share (QS); and IPQ to processors, based on their holdings of processor quota share (PQS). NMFS

⁵ Under the current timing, the initiation of the binding proceedings would begin on or before the 15th day preceding the season opening.

determines how much IFQ or IPQ is issued to a harvester or processor based on their annual IFQ and IPQ application, which must be delivered to the agency by August 1, each year. This annual IFQ and IPQ application is required so that NMFS issues the correct amount of Class A IFQ and Class B IFQ to harvesters that hold catcher vessel owner (CVO) QS. Class A IFQ requires delivery to a processor with IPQ, Class B IFQ can be delivered to any registered crab receiver. Based on the requirements established by the Program, a larger proportion of Class A IFQ is issued to harvesters who are affiliated with a processor. Each year, NMFS requires harvesters to indicate their affiliation status. This is essential so that harvesters that are affiliated and unaffiliated with processors receive the proper amount of Class A and Class B IFQ. The amount of Class A IFQ must match the amount of IPQ in a Program fishery. After NMFS receives the annual IFQ and IPQ applications on August 1, NMFS requires several days to process the applications prior to issuing IFQ and IPQ permits. In the case of the Aleutian Islands golden king crab fisheries, the processing of these applications could delay the allocation of IFQ and IPQ in the fishery several days after TACs are announced, resulting in issuance of IFQ and IPQ several days less than 15 days prior to the season opening. In the other fisheries, allocations should be made shortly after the TAC announcements (i.e., a few days less than 15 days prior to the season opening).

Regulatory Timing and Binding Arbitration

As noted earlier, binding arbitration proceedings undertaken through share matching must be initiated at least 15 days prior to the start of the season. Since initiation of those proceedings requires a commitment of IFQ and IPQ, a conflict arises because those shares are not issued 15 days prior to the season under the current schedule for share issuance. As a result, harvesters are unable to avail themselves of binding arbitration, because the deadline for initiating arbitration passes prior to the issuance of shares. Table 1 summarizes the specific timing of season openings, initiation of arbitration proceedings, and share issuance, as well as describes the timing conflict for each fishery.

Table 1. Timing of season opening, deadline for initiation of arbitration, TAC announcement, and IFQ and IPQ issuance under the current schedule.

| The season start date is.... | And binding arbitration must begin by | But the TAC is not announced by ADF&G until... | And NMFS cannot issue IFQ and IPQ until... | This creates an unworkable conflict because... |
|--|--|--|--|---|
| August 15 for: * Aleutian Islands golden king crab | July 31 | Late July | August 5 (approximately) | The timing of the issuance of IFQ and IPQ prevents share commitments necessary for initiating arbitration by the prescribed deadline |
| October 15 for: * Bristol Bay red king crab * <i>C. opilio</i> * <i>C. bairdi</i> * St. Matthews blue king crab * Pribilof red and blue king crab | September 30 | October 1 | October 5 (approximately) | |

While the timing conflict has prevented participants in the fisheries from using the prescribed timeline for initiating arbitration proceedings, participants have used the arbitration system by negotiating under the “lengthy season approach”.⁶ This approach to arbitration allows participants to agree to delay negotiations beyond the prescribe arbitration deadline. Although this resolution has allowed participants to rely to some extent on the arbitration system, to date, this resolution has been arrived at through the

⁶ The regulations at 50 CFR 680.20(h)(3)(iii) provide for the use of the “lengthy season approach”.

goodwill of the parties. While this resolution of the timing conflict may delay finalization of contracts to some extent, it has, to date, allowed participants to use the arbitration system, although not in the manner intended.

2.5 Analysis of Alternatives

This section analyses the different alternatives proposed for resolving the timing conflicts in the arbitration system.

Alternative 1 (status quo)

Under the status quo alternative, participants in the Program are unable to rely on access to the system of arbitration, as it was envisioned, for initiating arbitration actions. This is so, because, under the status quo, arbitration actions are required to be initiated prior to the issuance of IFQ and IPQ. Yet a prerequisite for initiating an arbitration proceeding is a commitment of IFQ. As a result, participants are unable to meet the conditions necessary to initiate a proceeding prior to the deadline specified for initiation of such actions. While participants have been able to utilize the arbitration process, they have done so only because of the willing concurrence of the IPQ holder. This is not consistent with the original intent of this binding arbitration provision in the Program. Its design was explicitly intended to provide unilateral access to binding arbitration to the IFQ holder (i.e., access with or without the consent of the IPQ holder).

If the status quo is maintained, arbitration is likely to only function through the parties agreeing to the lengthy season approach. While this resolution has generally allowed participants to rely on the arbitration system, a few shortcomings exist. First, the lengthy season approach could prove unreliable, if some participants do not consent to its use. If participants elect not to use the lengthy season approach, some IFQ holders could be denied access to the arbitration system altogether.

A second shortcoming to the lengthy season approach relates to the timing of resolution of contract terms. As originally developed, the arbitration system is intended to resolve pricing and other contract terms on or about the date of the season opening. The lengthy season approach could delay the resolution of terms substantially beyond the season opening. While a delay may be reasonable, if agreed to by the parties (or decided through arbitration to determine whether to use the lengthy season approach), it is possible that a delay of the resolution of pricing could be disruptive to operations of some participants. The length of the delay, and effects of that delay on operational decisions, cannot be predicted and will likely vary across participants. Depending on the circumstances of the parties, reliance on the lengthy season approach as the sole arbitration procedure for resolving contract terms could affect the relative negotiating positions of the participants. Specifically, if certainty of terms is of greater importance to one of the participants, it is possible that the other party could leverage the lengthy season approach to delay resolution of terms to the other party's detriment.

Alternative 2 (the preferred alternative) Time the arbitration initiation deadline from the issuance of IFQ and IPQ (with an assessment period)

Under this alternative, the timing periods for share matching and initiation of arbitration would be determined relative to the issuance of IFQ and IPQ. A 5-day "assessment period", during which only consensual commitments would be permitted, would precede unilateral share matching and initiation of arbitration.

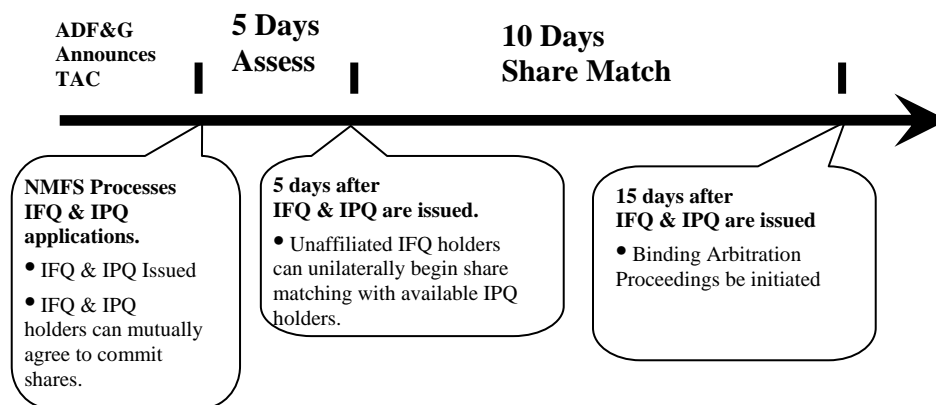
This approach was discussed and reviewed during a Program workshop, in Seattle, held on November 18, 2005, during Marine Expo (70 FR 10174). At its December 2005 meeting, the Council received a briefing from NMFS staff detailing the timing conflict and industry comments received during the November 2005 public meeting. The Council considered public comments and proposed limiting the

alternatives for consideration to those that resolve the timing conflict in a manner that closely matches the timing prescribed in the FMP. Modifying the following aspects of the arbitration are thought to accomplish that end:

- (1) The first change would define a 5-day period of time, after the issuance of IFQ and IPQ, for harvesters and processors to assess their quota holdings. During this time, IFQ holders and IPQ holders would be permitted to finalize mutually agreeable share commitments. Unilateral share matching by harvesters would not be permitted at this time.
- (2) The second change would allow holders of uncommitted Class A IFQ to unilaterally commit IFQ to holders of uncommitted IPQ at any time 5 or more days after the issuance of IFQ and IPQ.
- (3) The third change would create a 10-day period starting 5 days after the issuance of IFQ and IPQ, during which holders of committed Class A IFQ would be permitted to initiate binding arbitration.

This alternative is likely to resolve the timing conflict, ensuring that participants in the fishery have a reasonable, albeit short, period during which to initiate binding arbitration. Figure 1 presents the timeline under this alternative for negotiated share matching, unilateral share matching, and arbitration.

Figure 1. Alternative 2 - Issuance of IFQ and IPQ, Share matching, Initiation of arbitration Timeline (with a 5-day assessment period).



Resolving the timing conflict is likely to result in earlier settlement of terms of delivery (including price), which should provide more operational certainty for participants in both sectors. Since parties not wishing to settle all terms could still rely on the lengthy season approach, the modification would not change their ability to delay negotiations and contract settlements.

In addition to resolving the timing conflict for arbitration initiation, this alternative would prioritize negotiated commitments through the 5-day period during which unilateral commits are not permitted. This period is likely to contribute to stability in relationships among IFQ holders and IPQ holders, by permitting persons to resolve negotiated commitments prior to allowing unilateral commitments.

In addition, this 5-day period could result in more negotiated commitments, by prioritizing negotiated relationships over unilateral commitments. This may be so, because holders of uncommitted IFQ must matched their shares to whatever IPQ remains, following the negotiated commitment period. This could require holders of uncommitted IFQ to select from among a substantially smaller set of available IPQ holders, some of whom may be less desirable business partners (e.g., owing to plant location and/or associated attributes, market position or access considerations, management and operational characteristics, etc.). The more successful the negotiated commitment process, the greater will be the economic incentive for IFQ (and IPQ) holders to participate in it, and the greater the cost of delaying the matching process until the unilateral commitment period opens. With the added operational uncertainty, potential for protracted negotiation of contract terms, and use of the action of last resort through binding arbitration, transactions costs for operators who do not conclude an agreement during the negotiated commitment period, could be considerable.

Alternative 3 Time arbitration initiation deadline from the issuance of IFQ and IPQ (without an assessment period)

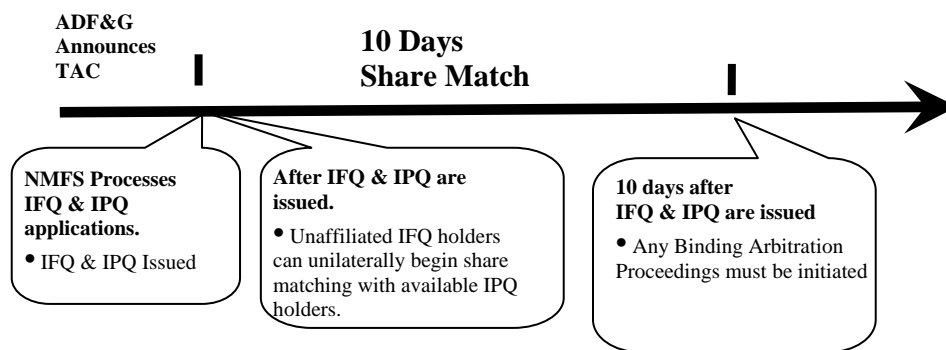
Under this alternative, the timing periods for share matching and initiation of arbitration would be determined relative to the issuance of IFQ and IPQ. Unilateral share matching and the initiation of arbitration proceedings would be permitted immediately upon the issuance of those shares.

The change to arbitration timing under this alternative is similar to the change under Alternative 2, but the period during which only voluntary share matching is permitted is omitted from this alternatives. This alternative modifies only the following two aspects of the arbitration:

- (1) The first change would allow holders of uncommitted Class A IFQ to unilaterally commit IFQ to holders of uncommitted IPQ at any time after the issuance of IFQ and IPQ.
- (2) The second change would create a 10-day period after the issuance of IFQ and IPQ, during which holders of committed Class A IFQ would be permitted to initiate binding arbitration

This alternative is likely to resolve the timing conflict, and thus ensure that participants in the fishery have a reasonable, albeit short, period during which to initiate binding arbitration. Unlike Alternative 2, however, this alternative does not include a 5-day period during which only negotiated commitments are permitted. Figure 2 presents the timeline for share matching, and arbitration.

Figure 2. Alternative 3 - Issuance of IFQ and IPQ, Share matching, Initiation of arbitration Timeline (without a 5-day assessment period).



As under the previous alternative, this alternative would resolve the conflict that prevents the timely initiation of arbitration proceedings by basing the period for arbitration initiation on the issuance of IFQ and IPQ. This change would provide all IFQ holders with the opportunity to initiate an arbitration proceeding, which could be resolved at or near the season opening. This modification would allow IFQ holders to petition the arbitrator to have the terms of delivery established before or early in the season providing additional certainty on which to base operational decisions. This timing of arbitration is also consistent with the timing of the arbitration outlined in the Council's original motion establishing the Program.⁷

Unlike the previous alternative, this alternative does not provide for a 5-day period, immediately following the issuance of IFQ and IPQ, during which only negotiated commitments are permitted. The absence of such a period would, in effect, remove the economic and operational incentives for "mutually agreed" commitments, offered under the previous alternative, and actually "shift" some or all of the transactions cost burden, cited above, from those persons that are unable (or unwilling) to develop voluntary commitments, to participants that would be willing and capable of reaching consensual arrangements. The absence of this period of negotiated commitments could also be disruptive to markets, by flooding IPQ holders with unilateral commitments from IFQ holders who fear being displaced by others. In some respects, the contrast between the behavioral patterns induced by Alternative 2, and those induced by Alternative 3, bear striking similarities to the differences between "rationalized" markets and "managed open access". In the latter circumstance, the "benefits" of a rational, appropriately paced, mutually beneficial process are likely, by and large, dissipated by the "race" to secure available IPQ. Such a race certainly has the potential to induce conflict, increase inefficiency and operational uncertainty, and perhaps diminish the establishment of stable, longer-term relationships between IFQ and IPQ holders. An orderly settlement of commitments is more likely to take place, yielding a more beneficial economic and operational outcome for the largest number of participants, if a period of negotiated commitments is permitted prior to allowing unilateral commitments. In addition, a period of negotiated commitments is more consistent with the intention of the existing timeline, which provides for negotiated commitments at any time in the pre-season (including prior to the period of unilateral share commitments).

2.6 Summary of Net Benefits to the Nation

Either of the alternatives to the status quo, currently proposed, would improve net benefits to the Nation, since the alternatives correct an administrative timing inconsistency, to improve the functioning of a price resolution mechanism, as originally envisioned for the Program. Under the status quo, arbitration cannot be initiated as contemplated under the Program, because IFQ and IPQ are issued after the deadline for arbitration to be initiated has expired. Although participants have managed to mutually agree to modify the schedule for arbitration, the inability to use the intended schedule could create some operational uncertainty and, in certain, circumstances could affect negotiations. Modifying the timing of initiation of arbitration could create some operational certainty, allowing participants to use the system to resolve price and other delivery terms, before or early in the season.

Net benefits to the Nation could be slightly higher under Alternative 2 (the preferred alternative), which includes a period of negotiated commitments between IFQ holders and IPQ holders, prior to allowing unilateral commitments by IFQ holders. This period of negotiated commitments could contribute to stability in the market, reduced transactions costs, increased economic efficiency, and strengthened relationships between IFQ holders and IPQ holders. While the 5-day period for negotiated commitments could delay arbitration findings in some cases, this minor delay is unlikely to have a significant adverse

⁷ Under this alternative, arbitration could be delayed under the lengthy season approach, if the parties consented to the approach, or the adoption of that approach was approved by an arbitrator.

affect on operational planning and prosecution of the fisheries. Indeed, efficiency gains would be expected to yield benefits to crab fishermen, crab processors, fishery support sectors, and domestic consumers of BSAI crab products. The aggregate result would be an expected net benefit to the Nation from adoption and implementation of the preferred alternative.

3.0 ENVIRONMENTAL ASSESSMENT

This EA tiers off of the Crab EIS to focus the analysis on the issues ripe for decision and eliminate repetitive discussions. The Crab EIS provides the status of the environment and analyzes the Crab Rationalization Program and its impacts on the human environment. The proposed action, altering the timing of binding arbitration procedures conducted under the share match provisions of the arbitration system, modifies a specific provision of the Crab Rationalization Program. This EA focuses on the specific impacts of the proposed action and provides details concerning the proposed action and its impacts.

The Council on Environmental Quality (CEQ) regulations encourages agencies preparing NEPA documents to “tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review”:

Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. (40 CFR 1502.20)

In 40 CFR 1508.28, the CEQ regulations further define tiering as “the coverage of general matter in broader environmental impact statements...with subsequent narrower statements of environmental analyses...incorporating by reference the general discussion and concentrating solely on the issues specific to the statement subsequently prepared.”

This section of the CEQ regulations further notes that “tiering is appropriate when the sequence of statements or analysis is from a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis....” (40 CFR 1508.28).

3.1 Purpose and Need

The purpose and need for the proposed action is explained in the Council’s problem statement:

The Council developed the arbitration system to provide a mechanism to resolve price disputes between harvesters and processors participating in the Bering Sea and Aleutian Islands (BSAI) crab fisheries. The effectiveness of the arbitration system is essential to the realization and equitable distribution of benefits under the rationalization program developed by the Council for the BSAI crab fisheries. As currently formulated, harvesters and processors are unable use the process for share matching and initiation of arbitration proceedings under of the arbitration system, because the timing specified for that process is inconsistent with the existing schedule for stock assessment, TAC determination, issuance of IFQ and IPQ for the fisheries, and the seasonal opening of the fisheries. Specifically, regulations currently specify the timeline for the arbitration system (and the timing of share matching and initiation of arbitration proceedings) relative to the season opening. The timing

of the issuance of IFQ and IPQ for the fisheries, however, prevents participants from share matching and initiating arbitration within the specified time periods.

The Council directed staff to develop alternative timing structures for the share matching and initiation of arbitration that substantially maintain the timing and overall effect intended in the original timelines established in the Program. The alternatives should constitute mechanical responses to an administrative timing issue. As such, this action would address an administrative timing conflict and provide for the effective implementation of the arbitration system of the Program.

Additional information on the purpose and need for the Program, the action area, public participation, and other related issues may be found in Chapter 1 of the EIS and are incorporated here by reference.

3.2 The Alternatives

Based on the Council's guidance, staff analyzed the following three alternatives for the management of the share matching and binding arbitration processes:

- 1) No action. The timing for share matching and initiation of binding arbitration is based on the season start date for a crab fishery. Under this alternative, holders of uncommitted Class A IFQ and holders of uncommitted IPQ may voluntarily agree to commit their respective shares at any time. Beginning 25 days prior to a season opening, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. At any time between 25 days and 15 days prior to the season opening, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration at least 10 days prior to the season opening, if last best offers are submitted more than 15 days prior to the season opening, or, otherwise, within 5 days of the submission of the last best offers.
- 2) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (including a 5-day assessment period for negotiated commitments). **(the preferred alternative)** For a period of 5 days after the issuance of IFQ and IPQ (the assessment period), holders of Class A IFQ and holders of IPQ may voluntarily agree to commit their respective shares. After this 5-day assessment period, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period beginning 5 days after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.
- 3) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (without a 5-day assessment period for negotiated commitments). After the issuance of IFQ and IPQ, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the

decision of the arbitration within 5 days of the submission of the last best offers.

Alternatives Considered and Eliminated from Detailed Study

The only other alternative that has been considered is to have the Alaska Board of Fisheries (the Board), who is responsible for several aspects of management of the fisheries⁸, modify the season start dates for the crab fisheries. Changing the season start dates could address the problem, by allowing additional time for share matching and arbitration under the current schedule. In March 2005, the Board reviewed season start dates for the crab fisheries. At that time, testimony to the Board indicated limited support for changing the season start dates to later in the year. Industry testifiers noted that a later season start date would compromise existing markets. If the crab industry wished to alter the season start dates, this would need to be undertaken through the Board process. Since this solution is beyond the authority of the Council under the current FMP and could affect economic returns from the fisheries, this alternative is being eliminated from detailed study.

3.3 Affected Environment

Chapter 3 of the Crab EIS contains a complete description of the human environment, including the physical environment, habitat, crab life history, marine mammals, seabirds, crab fisheries, a management history, the harvesting sector, the processing sector, and community and social conditions. These descriptions are incorporated by reference.

Crab Rationalization Program

Under the Crab Rationalization Program, NMFS allocated quota shares (QS) in each crab fishery to harvesters based on historic harvesting. Individual Fishing Quota (IFQ), in an amount equal to the TAC in the fishery, are issued annually to the holders of QS in proportion to their respective QS holdings in the fishery. So, QS represent the privilege to receive an annual allocation of IFQ that entitle the holder to harvest a certain portion of the annual TAC from the applicable fishery. Ninety percent the IFQ allocated are designated as "Class A" IFQ that must be delivered to a processor that holds individual processor quota (IPQ). Similar to harvesters, NMFS allocated to processors processor quota shares (PQS) based on historic processing. PQS represent the privilege to receive a portion of the annual pool of IPQ in a fishery. IPQ are issued for 90 percent of the TAC in each fishery and are distributed to PQS holders in proportion their PQS holdings. In part because of the one-to-one correspondence of Class A IFQ to IPQ, the Council developed an arbitration program to resolve disputes concerning price and terms of delivery for landings between harvesters and processors.

The Program allows harvesters that are not affiliated with a processor through ownership or control linkages (unaffiliated harvesters) to unilaterally match their Class A IFQ with available IPQ and to enter into a binding arbitration proceeding if the unaffiliated harvester and processor cannot agree on price or other delivery terms. Under the arbitration system, each party would submit a last best offer. The arbitrator would be limited to selecting from these two offers. The specific timing of share matching and

⁸ The FMP establishes a structure that categorizes management measures by management authority. Management is shared with the State of Alaska, to draw on State expertise concerning certain measures. Category 1 measures are those that are inherent Federal responsibilities under the Magnuson-Stevens Act and can only be amended through FMP amendments. Category 2 measures are those measures deferred to the State. Changes to management measures by the State are accomplished through the Board process. The FMP establishes a framework (or criteria) for Category 2 measures that guide State decision making on those measures. Category 2 measures may be developed by the BOF to the extent permitted by the framework. Category 3 measures are under the discretion of the State without FMP framework. Under the FMP Category 2 measures, the State of Alaska is authorized to establish season dates for the management of crab fisheries.

binding arbitration process is specified in the Fishery Management Plan for BSAI King and Tanner crabs (FMP). Any change to this timing schedule requires an FMP amendment.

As described in the purpose and need statement, harvesters and processors are unable to use the share matching and binding arbitration process do not with the existing schedule for issuance of harvesting and processing shares for the fisheries, and the seasonal opening of the fisheries. Specifically, regulations currently specify the timeline for the arbitration system (and the timing of share matching and initiation of arbitration proceedings) relative to the season opening. The timing of the issuance of IFQ and IPQ for the fisheries, however, prevents participants from share matching and initiating arbitration within the specified time periods. The delay for issuing IFQ and IPQ arises because of the need for annual survey data to be incorporated into the annual stock assessment and TAC setting processes. The timing of the survey and time needed for processing that data for stock assessments and TAC setting cannot be changed.

3.4 Analysis of the Alternatives

The proposed action is expected to have very few effects on the human environment beyond those analyzed in the Crab EIS. The proposed action simply modifies the timing of share matching and the binding arbitration process and is not expected to affect fishing under the Program. This section describes the effects of the proposed action on the human environment.

3.4.1 Effects on Administration, Management, and Enforcement

Administration, monitoring, and management of the arbitration system is generally as described in section 4.6 of the Crab EIS.

In general, administration, monitoring, and enforcement of the arbitration program are the same under all of the alternatives. In each case, the arbitration system is structured through the use of private contracts of participants in the fisheries, which each party may enforce through civil proceedings. Under this structure, the role of the agency in administering, monitoring, and enforcing is reduced to ensuring that parties have entered into contracts with the requisite provisions. This role is unchanged under all of the alternatives.

3.4.2 Effects on the Physical and Biological Environment

This section examines the impact of the choice of alternatives on components of the physical or biological environment).

The alternatives under consideration in this action differ only in the timing of share matching and any resulting binding arbitration proceedings. The alternatives have no affect on fishing practices or patterns and therefore have no effects on the physical and biological environment. Effects of the Crab Rationalization Program on the physical and biological environment (including effects on benthic species and habitat, essential fish habitat, the ecosystem, endangered species, marine mammals, and sea birds) are fully analyzed in Chapter 4 of the Crab EIS. That analysis is incorporated by reference. The Crab EIS concludes that for all of the components of the environment analyzed, the direct and indirect effects of the Crab Rationalization Program are insignificant based on the best available scientific information. Due to the nature of this action, the modification of this administrative timing is not expected to have additional impacts beyond those identified in the Crab EIS. No new significant information is available that would change these determinations in the Crab EIS.

3.4.3 Effects on the Social and Economic Environment

This section summarizes the effects on the social and economic environment from the RIR, which appear in Section 2.5. The economic and social impacts differ in fundamental ways from other resource components examined in this EA. They deal with impacts on persons and on communities, while other impacts deal with the natural environment. Significance findings for social and economic impacts would not affect a finding of no significant impact (FONSI); see 40 *CFR* 1508.14.

Since the analysis of social and economic factors is largely qualitative, this analysis does not make precise findings of significance based on quantitative thresholds. Instead, significance findings are based on the qualitative analytical findings concerning whether an impact is substantial.

Alternative 1, the no action alternative, would maintain the existing incompatibility of the timing of initiation of arbitration proceedings. Because of this inconsistency in timing, alternative 1 fails to fully implement a portion of the Program as recommended by the Council. In effect, the reliability of the arbitration system to resolve price disputes earlier in the season is limited. Although participants have used the “lengthy season approach” to effectively extend the deadline for initiating an arbitration proceeding to resolve a dispute concerning terms of delivery, the dependence of this approach on the cooperation of both IFQ and IPQ holders limits its reliability. In addition, the lengthy season approach could delay resolution of disputes beyond the period that would be expected, if the process for initiating arbitration could be applied as expected. The result could be either a loss of operational certainty arising from unsettled terms of delivery and potentially a shift in negotiating leverage, if one party is disproportionately affected by the uncertainty.

Both Alternative 2 (the preferred alternative) and Alternative 3 would provide harvesters with the opportunity to utilize the arbitration system to resolve disputes concerning terms of delivery (including price) in a manner consistent with the original intent of Program by setting the time period for initiation of an arbitration proceeding based on the issuance of IFQ and IPQ. Although neither of these options is likely to provide a price resolution through arbitration prior to the start of the seasons originally envisioned, both would provide an opportunity to resolve price disputes shortly after the start of the season. Neither of these alternatives would have effects on harvesters or processors different from those already considered under the EIS.

The difference between alternatives 2 and 3 is that alternative 2 includes a 5-day assessment period after the issuance of IFQ and IPQ during which share commitments are strictly consensual between IFQ holders and IPQ holders. Provision for this period could contribute stability to the share matching process and to harvester/processor relationships. Inclusion of this period in the arbitration timeline is also consistent with desires expressed at the public meeting held in Seattle in November 2005. By excluding this assessment period, alternative 3 could result in earlier resolution of arbitrated terms of delivery.

In summary, both alternative 2 and 3 maintain the original intent of the Program adopted by the Council. Although the timing of a final arbitration decision would be later than originally envisioned in the Council’s recommendation, both alternatives would provide harvesters and processors with an arbitration decision either shortly before, or shortly after, a crab fishing season begins. Neither alternative substantially affects the administration, management, or enforcement of the Program in ways not previously described in the EIS. Both alternatives slightly modify the timing of a binding arbitration decision, but the choice to enter into a binding arbitration decision, the timing of the fishery, or the ability to harvest crab under the program is not altered by either alternative. It is possible that the alternatives to the status quo could alter decisions by individual harvesters and processors concerning the timing of their fishing operations until the conclusion of a binding arbitration proceeding which could occur early in a crab fishing season. However, the potential delay is likely to be limited and would not be expected to

deviate significantly from harvesting and processing patterns that could result under their status quo quota alternative, and would not be expected to differ significantly from the timing previously analyzed under the Crab EIS prepared for the Program.

3.4.4 Cumulative Effects

Analysis of the potential cumulative effects of a proposed action and its alternatives is a requirement of NEPA. Cumulative effects are those combined effects on the quality of the human environment that result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions, regardless of what Federal or non-Federal agency or person undertakes such other actions (40 CFR 1508.7, 1508.25(a), and 1508.25(c)). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. The concept behind cumulative effects analysis is to capture the total effects of many actions over time that would be missed by evaluating each action individually. At the same time, the CEQ guidelines recognize that it is not practical to analyze the cumulative effects of an action on the universe but to focus on those effects that are truly meaningful.

Any cumulative effects arising out of this proposed action arise out of the relationship of the action to the overall Crab Rationalization Program and the relationship of the action to State regulation of the fisheries under the FMP. This action, however, will not affect fishing under the Crab Rationalization Program, as the action concerns only initial allocations of QS and PQS, and will have no cumulative effects beyond the direct and indirect effects considered in this analysis.

The cumulative effects of the Crab Rationalization Program are analyzed in Section 4.9 of the Crab EIS, including the interactive effects of any past, present, and reasonable foreseeable future external actions. That analysis is incorporated by reference. The Crab EIS concludes that for majority of the components of the environment analyzed, the cumulative effects of the Crab Rationalization Program are insignificant based on the best available scientific information. For some environmental components analyzed, the Crab EIS determined the cumulative effects were unknown because of a lack of sufficient information on the cumulative condition or the inability to predict effects of external future actions. The cumulative effects analysis in the Crab EIS is detailed and broad enough to encompass the likely cumulative effects of fishing under the Crab Rationalization Program. No new significant information is available that would change these determinations in the Crab EIS. This action will not result in additional impacts beyond those considered in the Crab EIS or in the above analysis and is not anticipated to change any of the cumulative effects conclusions. As previously discussed, there are no expected impacts of the alternatives on the components of the physical or biological environment. Therefore, no additional cumulative effects analysis is required for this proposed action.

4.0 REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act (RFA), first enacted in 1980, and codified at 5 U.S.C. 600-611, was designed to place the burden on the Federal government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business; (2) to require that agencies communicate and explain their findings to the public; and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities, and on the consideration of alternatives that may minimize the impacts, while still

achieving the stated objective of the action. When an agency publishes a proposed rule, it must either, (1)“certify” that the action will not have a significant adverse effect on a substantial number of small entities, and support such a certification declaration with a “factual basis”, demonstrating this outcome, or, (2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities.

Based upon an evaluation of the proposed alternatives, it appears that “certification” would not be appropriate. Therefore, this IRFA has been prepared. Analytical requirements for the IRFA are described below in more detail.

The IRFA must contain:

1. A description of the reasons why action by the agency is being considered;
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule;
3. A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
4. A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
6. A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
 - a. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 - b. The clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities;
 - c. The use of performance rather than design standards;
 - d. An exemption from coverage of the rule, or any part thereof, for such small entities.

The “universe” of entities to be considered in an IRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment, or portion thereof (e.g., user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

In preparing an IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule (and alternatives to the proposed rule), or more generally descriptive statements if quantification is not practicable or reliable.

4.1 Definition of a Small Entity

The RFA recognizes and defines three kinds of small entities: (1) small businesses; (2) small non-profit organizations; and (3) and small government jurisdictions.

Small businesses: Section 601(3) of the RFA defines a “small business” as having the same meaning as a “small business concern,” which is defined under Section 3 of the Small Business Act. A “small

business” or “small business concern” includes any firm that is independently owned and operated and not dominate in its field of operation. The U.S. Small Business Administration (SBA) has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business “involved in fish harvesting” is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates), and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates) and employs 500 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party, with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities, solely because of their common ownership.

Affiliation may be based on stock ownership when: (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) If two or more persons each owns, controls or have the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners control the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements

of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations: The RFA defines “small organizations” as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions: The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

4.2 A description of the reasons why action by the agency is being considered

Under the current FMP, a crab IFQ holder is intended to be permitted to initiate a binding arbitration proceeding with a crab IPQ holder to whom the IFQ holder has committed deliveries, prior to the start of the season, should a dispute arise concerning the terms of delivery (including price). The current timing of season start dates and IFQ and IPQ issuance prevents IFQ holders from satisfying the prerequisite of committing shares to an IPQ holder prior to initiating arbitration. This action would modify the FMP by altering the time table for arbitration initiation to allow IFQ holders to initiate arbitration proceedings as originally intended by the Council.

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

Under the current regulatory structure, Bering Sea/Aleutian Islands crab resources are managed by NOAA Fisheries and the State of Alaska, under the FMP. The authority for this action and the FMP are contained in the Magnuson-Stevens Act, as amended by the Consolidated Appropriations Act of 2004.

4.4 A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply

Fishing under the Crab Rationalization Program began in the August of 2005. Estimates of the number of small harvesting entities participating under the Program are complicated by several factors. First, each eligible captain will receive an allocation of QS under the Program. A total of 186 captains received preliminary allocations for the 2005-2006 fishery. In addition, 269 allocations of “Vessel Owner Shares” were made under the Program, for a total of 454 allocations in the BSAI crab fisheries. Since some persons participated as vessel owners and captains, and others will receive allocations based upon the activities of multiple vessels, only 294 unique persons are estimated to receive crab harvest share allocations. Affiliations among vessels or between vessels and processors, joint ownership of vessels, ownership of multiple vessels, sales, loss and replacement of vessels, etc., all confound accurate enumeration of “unique” entities, directly regulated by this action.

Since prices under the program could vary from previous years when the fishery was subject to different management, the gross revenues of participants are also difficult to predict. The best available approximation of crab prices are drawn from the market analysis prepared as a part of the arbitration system. Estimates of gross revenues for purposes of determining the number of small entities relied on the low estimates of prices from the arbitration reports. The arbitration report estimated low prices per pound of \$4.53 for Bristol Bay red king crab, \$1.35 for *C. opilio*, \$1.58 for *C. bairdi*, and \$2.27 for Aleutian Islands brown king crab. This IRFA relies on these prices, which may be unrealistically low, to avoid underestimating the number of small entities. Applying these prices to the allocations, 9 recipients are estimated to be large entities, and 285 are estimated to be small entities.

Allocations of PQS under the program were made to 29 processors. Estimates of large entities were made, based on available records of employment (Fried, 2005), information on participation in processing activities in other fisheries, and analysts' knowledge of foreign ownership of vertically integrated processing companies. Of the recipients of PQS, nine are estimated to be large entities, leaving eleven small entities among the directly regulated universe under consideration within this IRFA.

4.5 A description of the projected reporting, record keeping, and other compliance requirements

The reporting, record keeping, and other compliance requirements of the proposed rule will not change from those of the Crab Rationalization Program. As such, this action requires no additional reporting, record keeping, or other compliance requirements.

4.6 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule

The analysis uncovered no Federal rules that would conflict with, overlap, or be duplicated by the alternatives under consideration.

4.7 A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities

The Council adopted for analysis the following alternatives:

- 1) No action. The timing for share matching and initiation of binding arbitration is based on the season start date for a crab fishery. Under this alternative, holders of uncommitted Class A IFQ and holders of uncommitted IPQ may voluntarily agree to commit their respective shares at any time. Beginning 25 days prior to a season opening, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. At any time between 25 days and 15 days prior to the season opening, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration at least 10 days prior to the season opening, if last best offers are submitted more than 15 days prior to the season opening, or, otherwise, within 5 days of the submission of the last best offers.
- 2) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (including a 5-day assessment period for negotiated commitments). **(the preferred alternative)** For a period of 5 days after the issuance of IFQ and IPQ (the assessment period), holders of Class A IFQ and holders of IPQ may voluntarily agree to commit their respective shares. After this 5-day assessment period, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period beginning 5 days

after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.

- 3) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (without a 5-day assessment period for negotiated commitments). After the issuance of IFQ and IPQ, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.

The preferred alternative (Alternative 2) constitutes “the proposed rule”, referenced in the section heading above. Only Alternative 1 and Alternative 3 have been identified as “... significant alternatives to the proposed rule.” This section of the IRFA addresses a two part test. Specifically, does either Alternative 1 or Alternative 3 “... accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and ...(would either) minimize any significant adverse economic impact of the proposed rule (Alternative 2) on small entities”? The essence of this inquiry is, would selection of Alternative 1 or Alternative 3 achieve the outcome the Council seeks, and do so at a lesser cost to small entities, than Alternative 2?

Experience with the status quo (Alternative 1) has revealed inconsistencies in management of the BSAI crab fisheries that prevent harvesters from initiating binding arbitration proceedings. In practice, the timeline established in the Program effectively precludes the use of the arbitration system as it was originally intended. Participants have used the arbitration system, but only when both IFQ holders and IPQ holders have consented to a “lengthy season approach,” under which arbitration is delayed until an agreed upon time. This “mutually agreed” delay in initiation of arbitration, however, cannot be relied upon, and is precisely the reason the Council provided for a unilateral initiation process, so that the IFQ holder need not depend on the concurrence of the IPQ holder to bring closure to the negotiation of terms. Continued delay and avoidance of binding arbitration could significantly alter the relative negotiating positions of the IFQ and IPQ holders, and could impact operational certainty for some participants. Small entities are likely to suffer a disproportionate share of these possible adverse effects, since their smaller operations are likely to have less flexibility and access to fewer resources with which to respond to uncertainty and delay. As noted, small entities, which typically have fewer resources at their disposal, are more likely to incur costs that could render their operations uneconomical, perhaps forcing them to accept contract provisions that are not to their advantage, or even that result in their economic failure and departure from the crab fishery. Clearly, Alternative 1 neither achieves the objective of the action, nor minimizes the adverse impacts on small entities, when compared to the proposed rule.

Alternative 3 modifies the timeline in a manner that would allow IFQ holders that have committed shares to an IPQ holder to commence an arbitration proceeding within the allotted time. By modifying the timeline Alternative 3 address the shortcoming in the status quo alternative. The difference between this alternative and the proposed rule (Alternative 2) is the latter provides an assessment period for negotiated IFQ commitments, preceding the period during which IFQ holders can unilateral commit IFQ to a holder of uncommitted IPQ. As the RIR reveals, this provision of the proposed rule improves efficiency, reduces conflict and transactions costs for participants, contributes to stability in the fishery planning and prosecution process, and increases the potential for stable harvester/processor relationships by prioritizing

negotiated commitments. Alternative 3, while superior to the status quo alternative in terms of reducing the burden on small entities, does not provide a means of realizing these additional benefits which accrue from the proposed rule.

Therefore, none of the significant alternatives to the proposed rule (i.e., the preferred alternative) have the potential to achieve the objectives of this action, while minimizing the adverse economic impacts on directly regulated small entities. Furthermore, based upon this and the RIR analysis, there is no evidence or basis for concluding that these differential impacts will have a disproportionate adverse effect on small entities, as compared to other entities operating under these rules in the BSAI crab fisheries.

5.0 NATIONAL STANDARDS AND FISHERY IMPACT STATEMENT

5.1 National Standards

Below are the ten National Standards as contained in the Magnuson-Stevens Act, and a brief discussion of the consistency of the proposed alternatives with each of those National Standards, as applicable.

National Standard 1

Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery

Nothing in the proposed alternatives would undermine the current management system that prevents overfishing.

National Standard 2

Conservation and management measures shall be based upon the best scientific information available.

The analysis draws on the best scientific information that is available, concerning the BSAI crab fisheries. The most up-to-date information that is available has been provided by the managers of these fisheries, as well as by members of the fishing industry.

National Standard 3

To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

The proposed action is consistent with the management of individual stocks as a unit or interrelated stocks as a unit or in close coordination.

National Standard 4

Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The proposed alternatives would treat all participants in the arbitration system the same, regardless of their residence. The modification in the timing of the arbitration system proposed by the alternatives would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the system by resolving a timing inconsistency that affects the usefulness of the

arbitration system. The action will not contribute to an entity acquiring an excessive share of privileges under the Program.

National Standard 5

Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.

The alternatives under consideration should contribute to efficiency by contributing to operational certainty and reduced transactions costs by expediting the resolution of disputes concerning the terms of delivery of landings. By contributing to efficiency, these operational certainties serve objectives beyond economic allocation.

National Standard 6

Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

None of the alternatives would be expected to affect changes in the availability of BSAI crab resources each year. Any such changes would be addressed through the annual allocation process, which is not affected by the alternatives.

National Standard 7

Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

The allocations under the alternatives are necessary for fishing under the Crab Rationalization Program and would not duplicate any other laws. The costs of participating in the arbitration system would not be expected to increase under any of the alternatives. The alternatives would not be expected to increase the total number of potential arbitrations, or the costs of participating in the arbitration system. The preferred alternative is expected to reduce transactions costs associated with the IFQ/IPQ commitment process.

National Standard 8

Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

Implementing the alternatives will have no effect on communities. The impacts of the rationalization program on communities are generally addressed in the Crab EIS. No further effects arise out of this action.

National Standard 9

Conservation and management measures shall, to the extent practicable, (A) minimize bycatch, and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

Implementing any one of the alternatives will have no effect on bycatch. The impacts of the rationalization program on bycatch are generally addressed in the Crab EIS. No further effects arise out of this action.

National Standard 10

Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

The Crab Rationalization Program should reduce the incentives for crab fishermen to fish in inclement weather, or fish in a manner that compromises safety. The alternatives considered under this action do not affect any potential benefits arising out of those incentives.

5.2 Section 303(a)(9) – Fisheries Impact Statement

Section 303(a)(9) of the Magnuson-Stevens Act requires that any management measure submitted by the Council take into account potential impacts on the participants in the fisheries, as well as participants in adjacent fisheries. The impacts of the alternatives on participants in the harvesting sector and processing sector have been discussed in previous sections of this document. This action will have no effect on participants in other fisheries.

6.0 REFERENCES

Alaska Department of Fish and Game (September 2004) Annual Management Report for the Commercial and Subsistence Shellfish Fisheries of the Aleutian Islands, Bering Sea, and Westward Region's Shellfish Observer Program, 2003, Regional Information Report No. 4K04-43.

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