

## Fishery Conservation and Management

## § 680.21

are not specified in the arbitrated contract.

(B) Once exercised, the opt-in results in a contract that is binding on both the Arbitration IFQ and IPQ holder.

(ii) To initiate the opt-in process, the holder of uncommitted Arbitration IFQ will notify the holder of uncommitted IPQ in writing of its intent to opt-in.

(iii) Holders of uncommitted Arbitration IFQ may opt-in to a contract resulting from a completed Binding Arbitration procedure with a person that holds uncommitted IPQ for that fishery.

(iv) If the IPQ holder and the Arbitration IFQ holder are unable to resolve a dispute regarding whether the opt-in offer is consistent with the original contract from the completed Binding Arbitration procedure, the dispute may be decided by the Contract Arbitrator to the original arbitration that resulted in the contract to which the Arbitration IFQ holder is seeking to opt-in. The Contract Arbitrator will decide only whether the proposed opt-in terms are consistent with the original contract.

(10) *Performance disputes.* If an IPQ holder and an Arbitration IFQ holder are unable to resolve disputes regarding the obligations to perform specific contract provisions after substantial negotiations or when time is of the essence, the issues of that dispute shall be submitted for Binding Arbitration before a Contract Arbitrator for that fishery.

(i) Binding Arbitration resulting from a performance dispute can occur at any point during or after the crab fishing year. The dispute must be raised by the IPQ holder or the Arbitration IFQ holder. Arbitration of that performance dispute must be initiated prior to the date of the first crab fishing season for the following crab fishing year in that crab QS fishery.

(ii) Performance dispute arbitration shall follow the applicable procedures described for a Binding Arbitration in paragraph (h)(3) of this section, except that the time frame for the procedure applicable to a performance dispute will be determined by the Contract Arbitrator once the dispute has been raised.

(iii) If a party fails to abide by the arbitration decision, a party may pursue available contract remedies.

(iv) The costs of arbitrating performance disputes shall be provided from the general fees collected by the Arbitration Organizations pursuant to paragraph (e) of this section.

(v) The Contract Arbitrator may assign fees to any party bringing frivolous complaints. Any such fees shall be paid by the party and not from the fees collected under paragraph (e)(2)(vi) of this section.

(11) *Quality disputes.* When disputes regarding the quality of the harvested crab arise within the context of an existing contract, the parties may settle the disputes within the context of the arbitration system according to the following:

(i) In cases where the IPQ holder and Arbitration IFQ holder(s) have agreed to a formula-based price for crab but where they cannot reach an agreement on the quality and price of the crab, the IPQ holder and Arbitration IFQ holder(s) will receive their share of the value of the amount of crab delivered based on the provisions of the contract.

(ii) In quality disputes where the Arbitration IFQ holders prefer to use actual ex-vessel price and not a formula-based price and a dispute arises regarding crab quality and price, the dispute should be referred to a mutually agreeable independent quality specialist firm. This independent quality specialist firm will determine the quality of the crab. This information will be used as the basis for subsequent price determinations. The IPQ holder and Arbitration IFQ holder(s) with this quality dispute shall share the cost of hiring the specialist firm and agree to abide by its findings according to the terms of their agreement.

[70 FR 10241, Mar. 2, 2005, as amended at 70 FR 33395, June 8, 2005; 70 FR 75421, Dec. 20, 2005; 71 FR 40033, July 14, 2006]

### § 680.21 Crab harvesting cooperatives.

This section governs the formation and operation of crab harvesting cooperatives. The regulations in this section apply only to crab harvesting cooperatives that have formed for the purpose of applying for and fishing under a crab harvesting cooperative

IFQ permit issued by NMFS. Members of crab harvesting cooperatives that are not FCMA cooperatives should consult counsel before commencing any activity if the members are uncertain about the legality under the antitrust laws of the crab harvesting cooperative's proposed conduct.

(a) *Formation of crab harvesting cooperatives.* The following requirements apply to the formation of crab harvesting cooperatives.

(1) *Membership requirements.* A crab harvesting cooperative is limited to QS holders that hold any amount of CPO, CVO, CPC, or CVC QS, and that NMFS has determined are eligible to receive crab IFQ.

(i) *Minimum number of members.* Each crab harvesting cooperative must include at least four unique QS holding entities. A unique QS holding entity is a QS holder or group of affiliated QS holders that are not affiliated with any other QS holders or QS holding entities in the crab harvesting cooperative. For the purpose of this paragraph, the term "affiliation" is defined at § 680.2.

(ii) *Voluntary nature of membership.* Membership in a crab harvesting cooperative is voluntary. No person may be required to join a crab harvesting cooperative, and no crab harvesting cooperative may be required to accept a member who the crab harvesting cooperative chooses not to accept.

(iii) *Membership in more than one crab harvesting cooperative.* (A) A QS holder may join one crab harvesting cooperative per CR fishery.

(B) Upon joining a crab harvesting cooperative for a CR fishery, NMFS will convert all of a QS holder's QS holdings for that CR fishery to crab harvesting cooperative IFQ, except that after June 30, 2008, a CVC QS holder that joins a crab harvesting cooperative may retain his or her Class B IFQ from use by the crab harvesting cooperative.

(2) *Legal and organizational requirements.* A crab harvesting cooperative must meet the following legal and organizational requirements before it is eligible to apply for a crab harvesting cooperative IFQ permit:

(i) *Registered business entity.* Each crab harvesting cooperative must be formed as a partnership, corporation,

or other legal business entity that is registered under the laws of one of the 50 states or the District of Columbia.

(ii) *Appointment of a designated representative.* Each crab harvesting cooperative must appoint an individual as designated representative to act on the crab harvesting cooperative's behalf and serve as contact point for NMFS for questions regarding the operation of the crab harvesting cooperative. The designated representative may be a member of the crab harvesting cooperative or some other individual authorized by the crab harvesting cooperative to act on its behalf.

(b) *Application for annual crab harvesting cooperative IFQ permits.* A crab harvesting cooperative IFQ permit is an annual permit issued to a crab harvesting cooperative that establishes an annual catch limit of crab that is based on the collective QS holdings of the members of the crab harvesting cooperative that have been contributed by the members. A crab harvesting cooperative IFQ permit will list the IFQ amount, by fishery, held by the crab harvesting cooperative and identify the members of the crab harvesting cooperative. Each crab harvesting cooperative will be issued a separate IFQ permit for each type of QS held by a member (or members) of the crab harvesting cooperative.

(1) *August 1 application deadline.* A completed application for an annual crab harvesting cooperative IFQ permit must be submitted annually by each crab harvesting cooperative and received by NMFS no later than August 1, together with the signed annual application for crab IFQ/IPQ permit forms of all the members of the crab harvesting cooperative.

(2) *Contents of application for annual crab harvesting cooperative IFQ permit.* A completed application also must contain the following information:

(i) *Cooperative identification.* Enter the crab harvesting cooperative's legal name; type of business entity under which the crab harvesting cooperative is organized; state in which the crab harvesting cooperative is legally registered as a business entity; printed name of the crab harvesting cooperative's designated representative; the permanent business address, telephone

number, facsimile number, and e-mail address (if available) of the crab harvesting cooperative or its designated representative; and the signature of the crab harvesting cooperative's designated representative and date signed.

(ii) *Members of the cooperative.* Full name and NMFS Person ID of each member of the crab harvesting cooperative.

(iii) *Additional documentation.* For the application to be considered complete, the following documents must be attached to the application: the completed and signed annual application for crab IFQ/IPQ permit for all members of the crab harvesting cooperative, a copy of the business license issued by the state in which the crab harvesting cooperative is registered as a business entity, a copy of the articles of incorporation or partnership agreement of the crab harvesting cooperative, and a copy of the crab harvesting cooperative agreement signed by the members of the crab harvesting cooperative (if different from the articles of incorporation or partnership agreement of the crab harvesting cooperative).

(3) *Issuance of crab harvesting cooperative IFQ permits.* Upon receipt of a completed application for an annual crab harvesting cooperative IFQ permit that is subsequently approved, NMFS will issue one-year crab harvesting cooperative IFQ permits to the crab harvesting cooperative. The crab harvesting cooperative IFQ permits will list the crab IFQ amounts that are generated by the aggregate QS holdings of all members of the crab harvesting cooperative for each fishery, region, sector, and Class A/B IFQ categories. Issuance by NMFS of a crab harvesting cooperative IFQ permit is not a determination that the crab harvesting cooperative is formed or is operating in compliance with antitrust law.

(4) *Appeals.* A crab harvesting cooperative or person that is adversely affected by an initial administrative determination (IAD) that is associated with the issuance of a crab harvesting cooperative IFQ permit may appeal the IAD using the appeals procedures described in § 680.43.

(c) *Restrictions on fishing under a crab harvesting cooperative IFQ permit.* The following restrictions govern fishing

for IFQ crab under a crab harvesting cooperative IFQ permit:

(1) *Maintenance of permit on board.* A copy of a crab harvesting cooperative IFQ permit must be maintained on board any vessel that is being used to harvest crab under the permit.

(2) *Persons eligible to harvest crab under a crab harvesting cooperative IFQ permit.* The only person eligible to harvest crab under a crab harvesting cooperative IFQ permit is the crab IFQ hired master under § 680.4(g) who is operating a vessel in which at least a 10 percent ownership share is held by a member of the crab harvesting cooperative to whom the IFQ permit is issued.

(3) *Liability.* Each member of a crab harvesting cooperative is responsible for ensuring that members of the crab harvesting cooperative and crab IFQ hired masters of the crab harvesting cooperative comply with all regulations applicable to fishing for CR crab.

(d) *Transfers by members of a crab harvesting cooperative.* The following requirements address transfers of QS and IFQ by members of a crab harvesting cooperative.

(1) *Transfer of QS.* A member of a crab harvesting cooperative may acquire or divest QS at any time using the transfer procedures described in § 680.41. However, transfers of QS that occur after the August 1 deadline for crab harvesting cooperative IFQ permit applications will not be reflected in the type or amount of IFQ permit issued to the crab harvesting cooperative for the current fishing season.

(2) *Transfer of individually held IFQ.* A member of a crab harvesting cooperative may acquire or divest individually held IFQ using the transfer procedures described in § 680.41. However, any vessel used to harvest IFQ not held by a crab harvesting cooperative loses the vessel use cap exemption.

(3) *Transfer of crab harvesting cooperative IFQ prohibited.* A member of a crab harvesting cooperative may not acquire or divest crab harvesting cooperative IFQ. Crab harvesting cooperative IFQ may only be transferred between two crab harvesting cooperatives.

(e) *Transfers by crab harvesting cooperatives.* The following requirements address transfers of QS, IFQ, PQS, and

IPQ by crab harvesting cooperatives that have been issued crab harvesting cooperative IFQ permits.

(1) *Acquisition of QS, PQS, and IPQ prohibited.* A crab harvesting cooperative that has been issued a crab harvesting cooperative IFQ permit is prohibited from acquiring any amount of QS, PQS, or IPQ for the valid duration of the crab harvesting cooperative IFQ permit. A crab harvesting cooperative that acquires any amount of QS, PQS, or IPQ becomes ineligible to receive a crab harvesting cooperative IFQ permit.

(2) *Transfer of crab harvesting cooperative IFQ.* A crab harvesting cooperative may transfer its IFQ only to another crab harvesting cooperative. Crab harvesting cooperatives wishing to engage in an inter-cooperative transfer must complete an application for inter-cooperative transfer to transfer crab IFQ between crab harvesting cooperatives. A crab harvesting cooperative is prohibited from transferring any amount of crab harvesting cooperative IFQ to any entity that is not a crab harvesting cooperative operating under a crab harvesting cooperative IFQ permit.

(3) *Use caps.* Inter-cooperative transfers of IFQ will apply to the individual use caps of crab harvesting cooperative members through the designation of the crab harvesting cooperative members conducting the transfer.

(f) *Application for inter-cooperative transfer.* An application for inter-cooperative transfer is to be used only to apply for a transfer of crab harvesting cooperative IFQ from one crab harvesting cooperative to another crab harvesting cooperative. A complete application must also contain the following information:

(1) *Identification of transferor.* Enter the name; NMFS Person ID; date of incorporation; Tax ID number; name of crab harvesting cooperative's designated representative; permanent business mailing address; and business telephone number, facsimile number, and e-mail address (if available) of the crab harvesting cooperative transferor. A temporary mailing address for each transaction may also be provided in addition to the permanent business mailing address.

(2) *Identification of crab harvesting cooperative member.* Enter the name and NMFS Person ID of the member to whose use cap the crab harvesting cooperative IFQ will be applied.

(3) *Identification of transferee.* Enter the name; NMFS Person ID; date of incorporation; Tax ID number; name of crab harvesting cooperative's designated representative; permanent business mailing address; and business telephone number, facsimile number, and e-mail address (if available) of the crab harvesting cooperative transferee. A temporary mailing address for each transaction may also be provided in addition to the permanent business mailing address.

(4) *Identification of crab harvesting cooperative member.* Enter the name and NMFS person ID of the member from whose use cap the crab harvesting cooperative IFQ will be removed.

(5) *Crab harvesting cooperative IFQ to be transferred.* Identify the crab harvesting cooperative IFQ being transferred, including the type of crab harvesting cooperative IFQ being transferred, crab harvesting cooperative permit number and year that permit was issued. Indicate (YES or NO) whether all remaining pounds for the current fishing year are to be transferred; if NO, specify number of pounds to be transferred.

(6) *Transferor information.* Indicate (YES or NO) whether a broker is being used for this transaction. If YES, indicate the dollar amount to be paid in brokerage fees or percentage of total price. Enter the total amount being paid for the IFQ in this transaction, including all fees, and the price per pound of IFQ.

(7) *Certification of transferor.* The crab harvesting cooperative transferor's designated representative must sign and date the application certifying that all information is true, correct, and complete to the best of his or her knowledge and belief. Only an application with an original, notarized signature will be accepted. Also enter the printed name of the crab harvesting cooperative transferor's representative or authorized representative. If the application is completed by an authorized representative, proof of authorization to act on behalf of the transferor must

accompany the application. A Notary Public must sign the application, enter the date commission expires, and affix notary stamp or seal.

(8) *Certification of transferee.* The crab harvesting cooperative transferee's representative must sign and date the application certifying that all information is true, correct, and complete to the best of his or her knowledge and belief. Only an application with an original, notarized signature will be accepted. Also enter the printed name of the crab harvesting cooperative transferee's representative or authorized representative. If the application is completed by an authorized representative, proof of authorization to act on behalf of the transferee must accompany the application. A Notary Public must sign the application, enter the date commission expires, and affix notary stamp or seal.

(g) *Inseason changes to crab harvesting cooperative membership.* The following requirements address inseason changes to crab harvesting cooperative membership.

(1) *Eligible membership changes.* A crab harvesting cooperative may add a new member if that person becomes eligible to join the crab harvesting cooperative through the acquisition of any amount of the QS upon which the crab harvesting cooperative's annual IFQ permit was based, provided that the person acquiring the QS in question has been determined by NMFS to be eligible to hold IFQ. Likewise, a crab harvesting cooperative may remove a member if that person no longer holds any of the QS upon which the crab harvesting cooperative's annual IFQ permit was based.

(2) *Inseason membership changes are voluntary.* A crab harvesting cooperative is not required to add or remove members during the fishing season to reflect inseason transfers of QS. Each crab harvesting cooperative is free to establish its own process for deciding whether or not to admit new members or to remove existing members during the fishing season to reflect changes in the QS holdings. No crab harvesting cooperative is required to admit a new QS holder that the crab harvesting cooperative chooses not to admit, regardless of whether the person in question

has acquired any amount of QS upon which the crab harvesting cooperative's annual IFQ is based. If a crab harvesting cooperative chooses to make inseason membership changes, then it must comply with paragraph (g)(3) of this section.

(3) *Application for an inseason change in cooperative membership.* To change crab harvesting cooperative membership, a crab harvesting cooperative must submit to NMFS a revised application for an annual crab harvesting cooperative IFQ permit together with any revised supporting documents that are required to be submitted with the application. The revised application for an annual crab harvesting cooperative IFQ permit must be accompanied by a cover letter that indicates the revisions that have been made. Upon approval of the membership change, NMFS will issue a revised crab harvesting cooperative IFQ permit that reflects the change. A new member may not fish on behalf of a cooperative except as a crab IFQ hired master until NMFS issues a revised crab harvesting cooperative IFQ permit that reflects the change in membership.

(4) *Successors-in-interest.* If a member of a crab harvesting cooperative dies (in the case of an individual) or dissolves (in the case of a business entity), the QS held by that person will be transferred to the legal successor-in-interest. However, the crab harvesting cooperative IFQs generated by that person's QS holdings remain under the control of the crab harvesting cooperative for the valid duration of the crab harvesting cooperative IFQ permit. Each crab harvesting cooperative is free to establish its own internal procedures for admitting a successor-in-interest during the fishing season to reflect the transfer of QS due to the death or dissolution of a QS holder. The regulations in this section do not require any crab harvesting cooperative to admit a successor-in-interest that the cooperative chooses not to admit. If a crab harvesting cooperative chooses to admit the successor-in-interest for membership, then the crab harvesting cooperative must comply with paragraph (g)(3) of this section.

[70 FR 10241, Mar. 2, 2005, as amended at 70 FR 33395, June 8, 2005]