

following NMFS (evaluation under the Magnuson-Stevens Act procedures. Public comments on the proposed rule must be received by the close of the comment period on Amendments 92 and 82 to be considered in the approval/disapproval decision on Amendments 92 and 82. All comments received by the end of the comment period on Amendments 92/82, whether specifically directed to the FMP amendments or the proposed rule, will be considered in the approval/disapproval decision on Amendments 92 and 82. Comments received after the end of the public comment period for Amendments 92 and 82, even if received within the comment period for the proposed rule, will not be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received (not just postmarked or otherwise transmitted) by the close of business on the last day of the comment period.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: December 8, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 680

[Docket No. 080630808-8814-01]

RIN 0648-AW97

#### Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations implementing Amendment 28 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). This proposed regulation would amend the Bering Sea/Aleutian Islands Crab Rationalization Program to allow post-delivery transfers of all types of individual fishing quota and individual processing quota to cover overages. This action is necessary to improve flexibility of the fleet, reduce

the number of violations for overages, reduce enforcement costs, and allow more complete harvest of allocations. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable law.

**DATES:** Comments must be received no later than January 26, 2009.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by "RIN 0648-AW97," by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at <http://www.regulations.gov>.

- Mail: P.O. Box 21668, Juneau, AK 99802.

- Fax: 907-586-7557.

- Hand delivery to the Federal Building: 709 West 9<sup>th</sup> Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

This proposed action was categorically excluded from the need to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. Copies of Amendment 28, the categorical exclusion memorandum, and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) prepared for this action, as well as the Environmental Impact Statement (EIS) prepared for the Crab Rationalization Program may be obtained from the NMFS Alaska Region at the address above or from the Alaska Region website at <http://alaskafisheries.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Glenn Merrill, 907-586-7228, or Julie Scheurer, 907-586-7356.

**SUPPLEMENTARY INFORMATION:** The king and Tanner crab fisheries in the

exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) are managed under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Amendments 18 and 19 to the FMP implemented the BSAI Crab Rationalization Program (CR Program). Regulations implementing Amendments 18 and 19 were published on March 2, 2005 (70 FR 10174), and are located at 50 CFR part 680.

#### Background

Under the CR Program, NMFS issued quota share (QS) to persons based on their qualifying harvest histories in the BSAI crab fisheries during a specific time period. Each year, the QS issued to a person yields an amount of individual fishing quota (IFQ), which is a permit that provides an exclusive harvesting privilege for a specific amount of raw crab pounds, in a specific crab fishery, in a given season. The size of each annual IFQ allocation is based on the amount of QS held by a person in relation to the total QS pool in a crab fishery. For example, a person holding QS equaling 1 percent of the QS pool in a crab fishery would receive IFQ to harvest one percent of the annual total allowable catch (TAC) in that crab fishery. Catcher processor license holders were allocated catcher processor vessel owner (CPO) QS for their history as catcher processors; and catcher vessel license holders were issued catcher vessel owner (CVO) QS based on their catcher vessel history.

Under the CR Program, 97 percent of the initial allocation of QS was issued to vessel owners as CPO or CVO QS. The remaining 3 percent was issued to vessel captains and crew as "C shares" based on their harvest histories as crew members onboard crab fishing vessels. Of the CVO IFQ, 90 percent is issued as "A shares," or "Class A IFQ," which, in most fisheries, are subject to regional landing requirements and must be delivered to a processor holding unused individual processor quota (IPQ). This regional landing requirement is commonly referred to as "regionalization." The remaining 10 percent of the annual vessel owner IFQ is issued as "B shares," or "Class B IFQ," which may be delivered to any processor and are not subject to regionalization. C shares also are not subject to regionalization.

Processor quota shares (PQS) are long term shares issued to processors. These

PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued for 90 percent of the CVO TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.

NMFS can issue IFQ to the QS holder directly, or to a crab harvesting cooperative comprised of multiple QS holders. Crab harvesting cooperatives have been used extensively by QS holders to allow them to receive a larger IFQ pool and coordinate deliveries and price negotiations among numerous vessels. Most QS holders have joined cooperatives in the first three years of the CR Program, and are likely to continue to do so because of the economic and administrative benefits of consolidating their IFQs.

#### IFQ Overages Under Current System

Under existing regulations, harvesters are prohibited from exceeding the amount of IFQ that is issued to them, either individually, or to their cooperative (see § 680.7(e)(2)). If a harvester delivers more crab than the amount of IFQ that he holds, he has violated existing regulations, commonly known as an overage. Overages can occur either through deliberate actions, or more commonly through unintentional errors such as miscalculating the weight of catch to be delivered relative to the amount of IFQ available. Because harvesters do not know the precise weight of a delivery of crab, estimates made onboard the vessel using a sample of average weight may be lower than the actual delivery weight. If a harvester is making his or her last fishing trip for a season and no additional IFQ is available in his or her account, then an overage may occur. However, in most cases harvesters attempt to account for potential overages by maintaining catch below their IFQ holdings, slightly underharvesting the maximum amount of crab possible.

Similarly, existing regulations prohibit processors from receiving more Class A IFQ than the amount of unused IPQ that they hold (see regulations at § 680.7(a)(5)). Generally, processors have established relationships with specific harvesters before crab fishing begins and may not have unused IPQ available to receive crab from harvesters that do not have an established relationship with that processor. Under the provisions of the CR Program's Arbitration System, harvesters can choose to commit their Class A IFQ to match the IPQ held by processors (see regulations at § 680.20). Once IFQ shares are committed and matched with

a specific amount of IPQ, that IPQ cannot be matched to another harvester without first removing the match from the harvester who committed delivery of Class A IFQ crab to the IPQ held by that processor. Removing a match of Class A IFQ and IPQ requires the consent of the harvester. Therefore, it is possible that a processor holding IPQ may not have any available unmatched IPQ if a harvester were to deliver more Class A IFQ than the amount specified on his IFQ permit. Typically, processors refuse to accept a delivery of Class A IFQ that is greater than the amount of available unmatched IPQ.

Although matching Class A IFQ and IPQ among the numerous harvesters and processors can be complicated, overages are uncommon. In the first two crab fishing years under the CR Program (2005–2006 and 2006–2007), most of the IFQs were harvested and few overages occurred. There were 16 overages in the first and 25 in the second year under the CR Program. These overages represented less than 0.1 percent (1/1000) of the TAC in each year.

Currently, catcher vessel crab landings are offloaded and processed by the facility receiving the delivery. Once final weights have been determined, IFQs and IPQs are assigned by the fisherman and processor. Any IFQ overage is noted and referred to NOAA Fisheries Office for Law Enforcement (OLE).

#### Need for Proposed Action

At the request of industry to facilitate operations in the fishery, the Council adopted the following purpose and need statement for this action:

Under the crab rationalization program, harvesters receive annual allocations of individual fishing quota that provide an exclusive privilege to harvest a specific number of pounds of crab from a fishery. Any harvest in excess of an individual fishing quota allocation is a regulatory violation, punishable by confiscation of crab or other penalties. Precisely estimating catch at sea during the fishery is difficult and costly, due to variation in size of crab, and sorting and measurement requirements. Overages can result from mistakes, by participants attempting to accurately estimate catch. The inability to address overages also impedes flexibility in attempting to optimally harvest IFQ. A provision allowing for post-delivery transfer of individual fishing quota to cover overages could reduce the number of violations, allowing for more complete harvest of allocations, and reduce enforcement costs, without increasing the risk of overharvest of allocations.

Allowing post-delivery transfers in the crab fisheries is expected to mitigate potential overages, reduce enforcement

costs, and allow more complete harvest of allocations. Post-delivery transfers would also increase flexibility to the fleet and allow more efficient use of resources. As an example, this provision could allow harvesters to make landings and settle up IFQ accounts after delivery. In turn, this flexibility would permit harvesters to use vessels already on the fishing grounds without the additional use of fuel to leave boats idle at sea while an IFQ transfer is processed.

#### The Proposed Action

The proposed action would allow post-delivery transfers to cover overages of IPQ as well as Class A IFQ, Class B IFQ, C shares, and CPO IFQ. There would be no limit on the size of a post-delivery transfer or on the number of post-delivery transfers a person could undertake. However, a person could not begin a new fishing trip if any of the IFQ accounts of the IFQ permits available to be used on a vessel were zero or negative, and no person could have a negative balance in an IFQ or IPQ account after June 30, the end of a crab fishing year.

For IFQ holders, no person would be permitted to begin a new fishing trip in a crab fishery until the overage was accounted for and the IFQ balances of the persons onboard that vessel for all crab fisheries were positive. NMFS proposes to define the term "fishing trip" for purposes of this requirement to provide a clear standard for fishery participants. NMFS proposes that a fishing trip would be defined as the period beginning when a vessel operator commences harvesting crab in a crab QS fishery and ending when the vessel operator offloads or transfers any crab from that crab QS fishery whether processed or unprocessed from that vessel.

The term "crab QS fishery" is defined under existing regulations at § 680.2 and means all nine crab QS fisheries, but does not include the Western Alaska Community Development Quota (CDQ) Program, and Western Aleutian Islands golden king crab issued to the Adak Community Entity (ACE). The Council specifically tailored this proposed action to address IFQ and IPQ in the crab QS fisheries, and did not indicate that CDQ or ACE fisheries would be modified by this action. CDQ and ACE crab allocations are not issued as IFQ and there is no corresponding IPQ. Furthermore, CDQ groups that are issued CDQ crab allocations are permitted to engage in post-delivery transfers under section 305(i)(1)(C) of the Magnuson-Stevens Act, and because the ACE crab allocation is issued to only

one entity, it cannot be transferred, and there is no need to establish a post-delivery transfer mechanism.

The proposed definition of a fishing trip would effectively extend from the first harvest in a crab QS crab fishery until the beginning of a delivery of crab from a catcher vessel, or the beginning of offloading or transferring of processed crab from a catcher/processor. This definition would ensure that a vessel operator could not commence fishing for a crab QS fishery on any vessel until all the IFQ accounts of all IFQ permits used onboard that vessel are positive. This provision is intended to discourage harvesters from continuing to debit crab against their IFQ account for numerous fishing trips and run an increasingly negative balance without ensuring that there is adequate available unused IFQ that can be transferred to cover that negative balance. This provision would allow a vessel operator to begin a fishing trip for one crab QS fishery (e.g., snow crab) provided the harvester had unused IFQ in that fishery, even if that harvester had a negative balance in another crab QS fishery (e.g., Bristol Bay red king crab). However, in this example, if a vessel operator harvested (i.e., caught and retained) any Bristol Bay red king crab while fishing for snow crab, the harvester would be in violation of the regulations. This proposed rule would not modify existing regulations that require that IFQ issued to a cooperative can be transferred only between cooperatives, and that IFQ held outside of cooperatives can be transferred only to another person who would hold that IFQ outside of a cooperative.

The proposed action would minimize the risk of negative IFQ or IPQ accounts by prohibiting an IFQ or IPQ holder from maintaining a negative balance in an IFQ or IPQ account after the end of the crab fishing year for which that IFQ or IPQ account was issued. This prohibition would effectively require that all post-delivery transfers of IFQ or IPQ must be completed by June 30 of each year, the end of the crab fishing year. Overages that are not covered by June 30 of each year could be subject to a penalty or other enforcement action.

#### Expected Effects of the Proposed Action

The RIR describes in detail the predicted effects of the proposed action on harvesters, processors, communities, management and enforcement, consumers, and the nation (see **ADDRESSES**). Only the effects of the proposed action on harvesters and processors are described here. Overall, the number of overages at the time of landing may increase slightly under the

proposed action, but overages subject to penalty should decline.

Harvesters are likely to realize production efficiency gains under this alternative from allowing greater flexibility in harvesting. Under the status quo, harvesters may be required to wait in port or remain idle on the fishing grounds until a transfer can be processed and a positive IFQ balance is available. Under the proposed action, harvesters could finish their fishing trip and settle the balance when back in port. Some production efficiency gains should be realized by allowing harvesters to more precisely harvest the total IFQ allocation with fewer uncovered overages. Harvesters are also likely to benefit from a reduction in the number of overage violations, which should be reduced through post-delivery transfers. It is unlikely that harvesters will have excessive overages by unreasonable reliance on the provision for post-delivery transfers. This proposed action will most benefit Class A IFQ holders by allowing harvesters to continue operating without idling their operations and incurring additional costs.

This proposed action would have limited impacts on processors. Processors should have few overages, since overages can be avoided by simply refusing delivery of landings in excess of IPQ holdings. Only when a harvester has an IFQ overage that would be covered by a post-delivery transfer of Class A IFQ might a processor need to obtain IPQ to cover an overage.

This proposed action would require NMFS to debit IPQ accounts if a processor accepts delivery of Class A IFQ in excess of the amount of Class A IFQ that is matched with that processor. Typically, NMFS has not debited an IPQ account of a processor if an excess of Class A IFQ was delivered because NMFS did not wish to encourage waste by having processors refuse delivery of Class A IFQ, or debit an IPQ account of a processor and potentially cause the processor to exceed his IPQ account due to the actions of a harvester. However, with this proposed action, NMFS would debit the IPQ account of a processor who accepts Class A IFQ in excess of the amount in his IPQ account because that processor could subsequently balance his IPQ account through a post-delivery transfer of IPQ.

#### Recordkeeping and Reporting Requirements

No new recordkeeping or reporting requirements would be imposed by this action. NMFS Restricted Access Management Program (RAM) will continue to oversee share accounts and

share use. At the time of landing, RAM will maintain a record of any overage, but instead of reporting overages to NOAA OLE immediately, RAM would defer reporting until June 30, the end of the crab fishing year. RAM would use the same process for post-delivery transfers as currently used under regulations at § 680.41.

#### Summary of Regulatory Changes

This action proposes the following changes to the existing regulatory text at 50 CFR part 680:

- Add a new definition for the term “fishing trip” at § 680.2;
- Modify the existing prohibition at § 680.7(a)(5) to clarify that a person may not receive Class A IFQ greater than the amount of unused IPQ that person holds in a crab QS fishery unless they subsequently receive unused IPQ before the end of the crab fishing year to ensure their IPQ balance is not negative;
- Modify the existing prohibition at § 680.7(e)(2) to clarify that a person cannot begin a fishing trip with a vessel in a crab QS fishery if the total amount of unharvested crab IFQ that is currently held in the IFQ accounts of all crab IFQ permit holders or Crab IFQ Hired Masters onboard that vessel for that crab QS fishery is zero or less; and
- Add a prohibition at § 680.7(e)(3) to prohibit a person from having a negative balance in an IFQ or IPQ account for a crab QS fishery after the end of the crab fishing year for which that IFQ or IPQ permit was issued.

#### Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this proposed rule is consistent with Amendment 28, the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An IRFA was prepared that describes the economic impact this proposed rule, if adopted, would have on small entities. Copies of the RIR/IRFA prepared for this proposed rule are available from NMFS (see **ADDRESSES**). The RIR/IRFA prepared for this proposed rule incorporates by reference an extensive RIR/IRFA prepared for Amendments 18 and 19 to the FMP that detailed the impacts of the CR Program on small entities.

The IRFA for this proposed action describes the action, why this action is being proposed, the objectives and legal basis for the proposed rule, the type and number of small entities to which the proposed rule would apply, and

projected reporting, recordkeeping, and other compliance requirements of the proposed rule. It also identifies any overlapping, duplicative, or conflicting federal rules and describes any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson–Stevens Act and other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. The description of the proposed action, its purpose, and its legal basis are described in the preamble and are not repeated here.

This action directly regulates holders of IFQ and IPQ, who could engage in post–delivery transfers to cover overages if the action is adopted. Estimates of the number of small entities holding IFQ are based on estimates of gross revenues. Since many IFQs are held by cooperatives, landings data from the most recent season for which data are available in the crab fisheries (2006–2007) were used to estimate the number of small entities. Based on those data, 44 entities received IFQ allocations. Of these, 13 were large entities and 31 were considered small entities.

Estimates of small entities holding IPQ are based on the number of employees of IPQ holding entities. Currently, 24 entities receive IPQ allocations. Of these, 11 are estimated to be large entities and 13 are considered small entities.

Any person wishing to cover an overage would be required to engage in a transfer of IFQ (or IPQ, in the case of a processor). The required reporting and recordkeeping for a post–delivery transfer would be the same as for any other transfer of IFQ (or IPQ).

All of the directly regulated entities would be expected to benefit from this action relative to the status quo alternative because the proposed action would allow greater flexibility and a period of time in which to reconcile overages. Class A IFQ holders would be expected to benefit the most because

Class A IFQ comprises the majority of all IFQ issued in crab QS fisheries, and the proposed action would provide Class A IFQ holders greater flexibility to maximize harvests of their allocations without risking overages. Persons holding IFQ outside of a cooperative would be expected to benefit the least from this action because only a small portion of the total IFQ issued is issued to persons who hold IFQ outside of cooperatives, and they would have a limited pool of persons with whom to negotiate transfers. Among the three alternatives considered, the proposed action would best minimize potential adverse economic impacts on the directly regulated entities. Under the status quo, no post–delivery transfers would be allowed and small entities would continue to be penalized for overages. Alternative 3 would have allowed post–delivery transfers, but with more limitations and restrictions than the preferred alternative. The preferred alternative gives small entities the most flexibility to cover overages.

Allowing post–delivery transfers should reduce the number of overages that result in forfeiture of catch and other penalties. Persons holding IFQ outside of a cooperative may have a limited ability to make post–delivery transfers because most IFQs are assigned to cooperatives.

**List of Subjects in 50 CFR Part 680**

Alaska, Fisheries.

Dated: December 8, 2008.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 680 is proposed to be amended as follows:

**PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA**

1. The authority citation for 50 CFR part 680 continues to read as follows:

**Authority:** 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

2. In § 680.2, the term “Fishing trip for purposes of § 680.7(e)(2)” is added in alphabetical order to read as follows:

**§ 680.2 Definitions.**

\* \* \* \* \*

*Fishing trip for purposes of § 680.7(e)(2)* means the period beginning when a vessel operator commences harvesting crab in a crab QS fishery and ending when the vessel operator offloads or transfers any crab in that crab QS fishery whether processed or unprocessed from that vessel.

\* \* \* \* \*

3. In § 680.7, paragraphs (a)(5) and (e)(2) are revised, and paragraph (e)(3) is added to read as follows:

**§ 680.7 Prohibitions.**

\* \* \* \* \*

(a) \* \* \*

(5) Receive any crab harvested under a Class A IFQ permit in excess of the total amount of unused IPQ held by the RCR in a crab QS fishery unless that RCR subsequently receives unused IPQ by transfer as described under § 680.41 that is at least equal to the amount of all Class A IFQ received by that RCR in that crab QS fishery before the end of the crab fishing year for which an IPQ permit was issued.

\* \* \* \* \*

(e) \* \* \*

(2) Begin a fishing trip for crab in a crab QS fishery with a vessel if the total amount of unharvested crab IFQ that is currently held in the IFQ accounts of all crab IFQ permit holders or Crab IFQ Hired Masters aboard that vessel in that crab QS fishery is zero or less.

(3) Have a negative balance in an IFQ or IPQ account for a crab QS fishery after the end of the crab fishing year for which an IFQ or IPQ permit was issued.

\* \* \* \* \*

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