

**Exemption of Custom Processing from Crab Processing Caps
North Pacific Fishery Management Council
February 2006**

The recent reauthorization of the Magnuson Stevens Act (MSA) included a provision to exempt custom processing in the North region of the Bering Sea *C. opilio* fishery from processing use caps established under the crab rationalization program. At its December 2007 meeting, the Council heard public testimony requesting that this exemption be extended to include processing of West region shares in the Western Aleutian Islands golden king crab fishery and the Western Aleutian Island red king crab fishery. In response to that testimony, the Council requested staff to prepare this discussion paper describing possible approaches to developing an amendment for this West region custom processing activity and the potential integration of such an amendment with any analysis that would be required to implement the Bering Sea *C. opilio* custom processing exemption included in the MSA reauthorization.

Background

To understand the use cap exemptions adopted under the MSA reauthorization and the proposed to the Council requires a basic understanding of the current processing share allocations and processing share use caps. Under the program, processor quota shares (PQS) were allocated to eligible processors in each fishery based on qualified processing history. Holders of PQS receive annual allocations of individual processor quota (IPQ), which authorize the holder to accept delivery of a specific number of pounds of crab harvested with Class A individual fishing quota (IFQ). Class A IFQ have one-to-one correspondence with IPQ and are issued for 90 percent of the annual total allowable catch (TAC) in each fishery. In the Bering Sea *C. opilio*, fishery Class A IFQ and IPQ are regionalized, with each share designated for landing either North or South of 56°20' N latitude (i.e., North region or South region). Allocations to North are approximately one-half of the total IPQ allocation in the fishery.

As adopted by the Council, the use caps prevent a single processor from using more than 30 percent of the processing shares in a fishery. An additional provision limits any processor from using in excess of 60 percent of the processing shares in the Northern region in the Bering Sea *C. opilio* fishery. No regional processing cap applies in any other fishery. So, a processor in the North would be restricted to processing 60 percent of the North IPQ allocation and to processing no more than 30 percent of the total allocation (including all processing in the North and South). Depending on the amount and North/South distribution of a processor's activity, either or both of these caps could be constraining. In most cases, though, the roughly equal allocation of shares in the North and South implies that if the North processing cap is binding, the overall cap will also bind.

The caps are interpreted to prohibit a processor from holding either the long term PQS or the annual IPQ yielded by PQS in excess of the cap. Under the original rule, any crab delivered to and processed by a plant (including any custom processing) would be attributed to the plant owner for purposes of applying the cap. Construed in this manner, the caps require at least two processors to operate in the North region.

In the Western Aleutian Islands red king crab and Western Aleutian Islands golden king crab fisheries, 50 percent of the Class A IFQ and IPQ are regionalized, with landings from those shares required to be made west of 174° W longitude (the West region). These West region shares in this fishery were issued proportionally to history, since qualified history in the West region was less than 50 percent of the total qualified history. The 30 percent share cap effectively requires two processors to operate in the West region for these fisheries.

MSA exemption of North custom processing in the Bering Sea *C. opilio* fishery from processing use caps

The suggested revision to the use caps in the Western Aleutian Islands fisheries would be based on the exemption developed in the MSA for the Bering Sea *C. opilio* fishery. Generally, that provision would exempt custom processing in the North region from the use caps. Provided processing share holders comply with the custom processing exemption, all North processing could be undertaken at a single facility. The rationale for the provision is that the slow rate of landings under the rationalization program has reduced processing efficiencies, particularly in low TAC years. Allowing all North processing to occur at a single platform would improve efficiencies. Limiting the exemption to custom processing is intended to prevent consolidation of holdings that could occur, if the processing of held or owned shares were included in the exemption. The specific provision in the MSA affecting the *C. opilio* fishery processing caps provides:

- (1) IN GENERAL. – Notwithstanding sections 680.42(b)(ii)(2) and 680.7(a)(ii)(7) of title 50, Code of Federal Regulations, custom processing arrangements shall not count against any use cap for the processing of *opilio* crab in the Northern Region so long as such crab is processed in the North region by a shore-based crab processor.
- (2) SHORE-BASED CRAB PROCESSOR DEFINED. – In this paragraph, the term “shore-based processor” means any person or vessel that receives, purchases, or arranges to purchase unprocessed crab, that is located on shore or moored within the harbor.

MSA §122(e).

The provision references two sections of the crab rationalization program regulations. Section 680.7 defines prohibitions, including the prohibitions on use of processing shares from which custom processing in the North region would be exempt. Section 680.42 sets out the specific caps, which include both a use cap of 30 percent on Bering Sea *C. opilio* processing shares and a use cap of 60 percent on North region Bering Sea *C. opilio* processing shares. The provision is believed to be intended to exempt custom processing arrangements from both of these caps.

Implementation of this provision raises a few questions. First, ‘custom processing’ must be defined for purposes of applying the exemption. Currently, federal regulations do not contain a definition of custom processing. Generally, custom processing is understood to be an arrangement under which a person processes crab on behalf of another, never taking ownership of the crab. Alaska regulations define a “custom processor” as a person who sells or offers for sale the service of seafood processing but who does not own the seafood being processed (18 AAC 34.990). This provision is implemented by identifying the actual owner of the crab (rather than the person processing the crab under the custom processing arrangement) on the fish ticket. Section 680.5(d)(8) contains a provision requiring a processor of crab to identify the party for which custom processing is being undertaken. This requirement could be used to identify processing that falls within the use cap exemption. Such an approach parallels the State of Alaska’s treatment of custom processing arrangements (which is used, in part, for determining liability for fish tax payments).

A second issue that arises is the interpretation of “moored within the harbor”. The provision is somewhat ambiguous, since no definition of “harbor” is contained in the current regulations. Legislative intent is believed to be lacking concerning this definition. Since the North region contains several harbors – for example, St. Paul, St. George, and Nome are all in the North region and have harbors – the provision will require development of a workable definition of “moored within the harbor”.

To implement the use cap exemption, NOAA Fisheries will need to adopt conforming regulations. The revision will also require analysis of the interpretation of these specific cap exemptions. The timing of the analysis is not currently scheduled, but is likely to begin in the near future. The analysis and rule making process are likely to proceed in the usual timeline, which will encompass several months prior to finalization in regulation. In the meantime, NOAA General Counsel has issued the guidance letter attached concerning its interpretation of the MSA Bering Sea *C. opilio* custom processing exemption. That guidance will be superseded by future regulations addressing the exemption.

Exemption of custom processing in the Western region of the Western Aleutian Islands golden king crab and Western Aleutian Island red king crab fisheries from processing use caps

The crab rationalization program limits processing by a person to 30 percent of the processing shares in a fishery (including both the Western Aleutian Islands golden king crab fishery and Western Aleutian Island red king crab fishery). At the same time, 50 percent of the processing shares in each of the two Western Aleutian Islands crab fisheries are designated for landing in the region west of 174° W longitude. Some participants in the fishery believe that this constraint on processing has led to diseconomies in the fisheries, similar to those reported in the Bering Sea *C. opilio* fishery. In the Western Aleutian Islands golden king crab fishery these diseconomies are asserted to have contributed to a portion of the fishery being left unharvested. To address this issue, the Council could consider adopting a provision for the Western Aleutian Islands crab fisheries similar to the MSA provision, such as:

Custom processing of crab by a processor operating onshore or moored in a harbor the Western Aleutian Islands golden king crab fishery or Western Aleutian Islands red king crab fishery will not count toward processing use caps.

Although slightly revised, this provision would effectively relax the use cap in the Western Aleutian Islands fisheries under the same circumstances as is done for the Bering Sea *C. opilio* fishery by the MSA provision. This provision differs substantively from the provision proposed in public testimony in one respect. That proposal removed the exemption for processing platforms moored in a harbor. The removal of that provision provides the owners of existing shore plants with a much stronger position in the market by limiting the ability of floating processors to compete on the same terms (i.e., subject to the same exemption). Instead, for another processor to compete on equivalent terms with the existing shore plant would require the capital investment to develop a crab processing shore plant in the region. Compelling the development of additional shore facilities to induce competition would seem inappropriate and inconsistent with the stated rationale for the exemption. If the Council disagrees with this interpretation, it could include the provision exempting custom processing when moored in a harbor as an option.

An approach to development of an amendment

If the Council elects to advance this option for analysis, including fully defining custom processing and specifying the criteria for determining whether a vessel is moored in a harbor, could be accomplished in the same analysis of those issues for the MSA exemption for the Bering Sea *C. opilio* fishery. This approach would save on staff time, simplify the development of consistency between the MSA provision and any amendment the Council wished to develop, and simplify public participation in the development of these changes.



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The NOAA Office of General Counsel for Enforcement and Litigation, Alaska Region, issues the following statement:

On October 15, 2006, the opilio crab fishery season in the Bering Sea subarea opened and, as of the date of this statement, is still open.

On January 12, 2007, the Magnuson Stevens Fishery Conservation and Management Act was reauthorized by the U.S. Congress and signed by the President. (PL 109-479, HR 5946, January 12, 2007).

The following two provisions relating to the processing and use of individual processor quota (IPQ) for the *C. opilio* crab fishery in the Bering Sea subarea are contained in that Act:

SEC. 122. CONVERSION TO CATCHER/PROCESSOR SHARES.

(e) USE CAPS.—

(1) IN GENERAL.--Notwithstanding sections 680.42(b)(ii)(2) and 680.7(a)(ii)(7) of title 50, Code of Federal Regulations, custom processing arrangements shall not count against any use cap for the processing of opilio crab in the Northern Region so long as such crab is processed in the Northern Region by a shore-based crab processor.

(2) SHORE-BASED CRAB PROCESSOR DEFINED.--In this paragraph, the term "shore-based crab processor" means any person or vessel that receives, purchases, or arranges to purchase unprocessed crab, that is located on shore or moored within the harbor.

For purposes of assisting fishermen and processors in complying with the above provisions, the NOAA Office of General Counsel for Enforcement and Litigation, Alaska Region, provides the following guidance:

(1) The phrase "custom processing arrangements" as used in Section 122(e)(1) refers to:

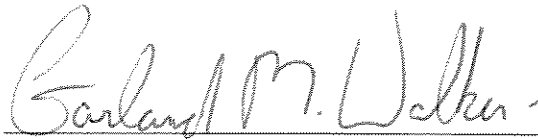
(a) a binding and legal contractual arrangement for the processing of crab that is entered into prior to the occurrence of the processing of the crab and;



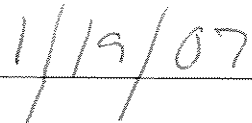
(b) in which the processed crab is debited from an IPQ account other than the IPQ account belonging to the owner of the processing plant at which the contract processing occurs.

- (2) The phrase “any use cap” as used in Section 122(e)(1) refers to the IPQ use cap as defined in 50 CFR 680.42(b)(1)(ii), or 50 CFR 680.42 b)(2), and calculated as defined in 50 CFR 680.7(a)(7).
- (3) The phrase “Northern Region” as used in Section 122(e)(1) refers to IPQ derived from processor quota share designated for the North Region as defined in 50 CFR 680.40(d)(2)(i).
- (4) The phrase “shore-based crab processor” as used in Section 122(e)(2) includes the terms “shoreside crab processor” or “stationary floating crab processor” as those terms are defined in § 680.2.
- (5) The phrase “moored within the harbor” as used in Section 122(e)(2) means moored within the harbor of St. George Island or St. Paul Island, located in the Pribilof Islands as those harbors are defined in NOAA marine charts 16381 and 16382 respectively.

This guidance is issued under the prosecutorial discretion authority inherent to this office. A formal rule making process is expected to be undertaken in the future to refine the above sections. Publication of a formal rule in the Federal Register constitutes constructive notice to all regulated parties of a rule promulgation. Upon publication of a rule addressing the above sections, this guidance is automatically rescinded and may no longer be relied upon.



Date



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NOAA Office of General Counsel for Enforcement and Litigation, Alaska Region