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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 680**

[Docket No. 0812081573-1423-02]

RIN 0648-AX47

**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 30 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). This proposed rule would amend the Bering Sea/Aleutian Islands Crab Rationalization Program (CR Program) to modify procedures for producing and submitting documents that are required under the Arbitration System to resolve price, delivery, and other disputes between harvesters and processors. This action is necessary to improve the quality and timeliness of market information used to conduct arbitration proceedings. 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 September 9, 2011.

**ADDRESSES:** Send comments to Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by "RIN 0648-AX47," by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Web site 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 9th 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.

Copies of Amendment 30, the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) and the categorical exclusion prepared for this action—as well as the Environmental Impact Statement (EIS) prepared for the CR Program—may be obtained from the NMFS Alaska Region at the address above or from the Alaska Region Web site at <http://alaskafisheries.noaa.gov>. NMFS determined that this proposed action was categorically excluded from the need to prepare an environmental assessment under the National Environmental Policy Act.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS Alaska Region by e-mail to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov), or fax to 202-395-7285.

**FOR FURTHER INFORMATION CONTACT:** Forrest R. Bowers, 907-586-7240.

**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 FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act. Amendments 18 and 19 to the FMP implemented the CR Program. Regulations implementing the FMP, including the CR Program, 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 providing 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 1 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 history as a catcher vessel.

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 CPC or CVC QS based on their harvest histories as crew members onboard crab fishing vessels. Ninety percent of the annual CVO IFQ is issued as A shares, or Class A IFQ, which are subject to landing requirements in specific geographic regions, and must be delivered to a processor holding unused individual processor quota (IPQ). The remaining 10 percent of the annual CVO IFQ is issued as B shares, or Class B IFQ, which may be delivered to any processor and are not subject to regionalization. CPO, CPC, and CVC IFQ are not subject to regionalization and are not required to be matched with a processor holding IPQ.

NMFS also issued processor quota shares (PQS) to processors based on their qualifying processing histories in the BSAI crab fisheries during a specific time period. These PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued in an amount equivalent to the Class A IFQ, creating a one-to-one correspondence between Class A IFQ and IPQ. Prior to the start of a crab fishing season, Class A IFQ and IPQ holders match their shares with one another, thereby determining their markets for the coming year. These matches may be modified during the crab season, but both parties must consent to any modifications.

**Arbitration System**

The CR Program requires holders of Class A IFQ to deliver their catch to processors holding IPQ for a specific crab fishery within a specific geographic region. Potential disputes among harvesters and processors during price and delivery negotiations can occur, and the share matching requirements can exacerbate these disputes. To fairly address potential price and delivery disputes that may arise between Class A IFQ holders and IPQ holders, the CR

Program includes an arbitration system. Disputes are most likely to occur in cases where the Class A IFQ holder is not affiliated with an IPQ holder through common ownership or control and the IPQ holder will not consent to modification of the preseason share matching, thereby allowing the IPQ holder to dictate prices or other conditions without the ability of the Class A IFQ holder to move to an alternative market. Class A IFQ holders who are unaffiliated, or independent, of IPQ holders are commonly known as unaffiliated Class A IFQ holders. Conversely, Class A IFQ holders who are affiliated with IPQ holders through common ownership and control are known as affiliated Class A IFQ holders. Affiliated Class A IFQ holders are not eligible to use the arbitration system to settle price or other disputes. Affiliated Class A IFQ holders do not require an arbitration system, because they are integrated with IPQ holders and do not have distinct and potentially adversarial negotiating positions as may be the case with unaffiliated Class A IFQ and IPQ holders.

The arbitration system allows unaffiliated Class A IFQ holders to initiate an arbitration proceeding in the event of a dispute to allow an independent third party to provide a review of harvester and processor negotiation positions and provide an independent and binding resolution to issues under dispute. Regulations describing the arbitration system are found at 50 CFR 680.20. An extensive discussion of the components of the arbitration system is found in the preambles to the proposed rule (September 1, 2004; 69 FR 53397) and final rule (March 2, 2005; 70 FR 10174) that implemented the CR Program, as well as in the final EIS prepared for the Program, and is not reiterated here (see **ADDRESSES**).

To facilitate arbitration proceedings, the arbitration system establishes a series of contractual requirements that CVO QS, PQS, Class A IFQ, and IPQ holders must meet that dictate how the arbitration system will function. Regulations require that all unaffiliated CVO QS and Class A IFQ holders join an Arbitration Organization (AO). Similarly, affiliated CVO QS and Class A IFQ holders are required to join a separate AO. PQS and IPQ holders are required to join a third AO. Regulations further require that these three AOs enter into a series of contracts that will allow the arbitration system to function. Although affiliated Class A IFQ and IPQ holders must join AOs, the primary role of the arbitration system is to facilitate negotiations among the unaffiliated

Class A IFQ and IPQ holders. Therefore, this proposed rule would primarily affect unaffiliated Class A IFQ and IPQ holders. For clarity in this proposed rule, the AO representing unaffiliated CVO QS and Class A IFQ holders will be called the unaffiliated Class A IFQ arbitration organization, the AO representing affiliated CVO QS and Class A IFQ holders will be called the affiliated Class A IFQ arbitration organization, and the AO representing PQS and IPQ holders will be called the IPQ arbitration organization.

Under the arbitration system, all AOs must establish contracts to hire an independent third-party data provider, who will provide up-to-date information on matches between Class A IFQ and IPQ holders for crab deliveries and contracts to hire independent experts to facilitate arbitration proceedings. Only the unaffiliated Class A IFQ AOs and the IPQ AOs can enter into contracts to hire: (1) A market analyst, who provides a pre-season market report of likely market conditions for each crab fishery to aid in price negotiations and arbitrations; (2) a formula arbitrator, who prepares a non-binding price formula that describes the historic division of first whole-sale values among harvesters and processors that can be used in price negotiations and arbitrations; and (3) a contract arbitrator, who reviews the positions of the parties during an arbitration proceeding and issues a binding decision based on a last-best offer form of arbitration.

Under current regulations, contracts with the market analyst, formula arbitrator, and contract arbitrator must be established by June 1 and can only be established by the mutual agreement of unaffiliated Class A IFQ AOs and IPQ AOs. "Mutual agreement," as defined in 50 CFR 680.2, requires the consent and agreement of unaffiliated Class A IFQ AOs that represent an amount of unaffiliated Class A IFQ equal to more than 50 percent of all the unaffiliated Class A IFQ in a fishery, and IPQ AOs that represent an amount of IPQ equal to more than 50 percent of all the IPQ in a fishery based upon the Annual Arbitration Organization Reports. This mutual agreement requirement is intended to ensure that the majority of the unaffiliated Class A IFQ and IPQ holders reach agreement on the contracts that will provide necessary services for the functioning of the arbitration system, but avoid the potential that the process could be compromised by the inability of all unaffiliated Class A IFQ or IPQ holders to reach unanimity on the contracts.

During an arbitration proceeding, the contract arbitrator is required to

consider the market report and the non-binding price formula when considering the offers provided by the parties to the arbitration proceeding. Because the market report and the non-binding price formula play a central role in the decision-making process of the contract arbitrator, the information used in their preparation and the timing of their production can affect their utility and importance.

#### **Need for Proposed Action**

As the CR Program has progressed, it has become clear to the unaffiliated Class A IFQ and IPQ holders—as well as to the market analyst, the formula arbitrator, and the contract arbitrator—that certain aspects of the existing requirements for the timing and content of the market report and non-binding price formula limit the effectiveness of the arbitration system. This proposed rule would modify four aspects of the arbitration system to improve its effectiveness by: (1) Allowing AOs to mutually agree to establish contracts that would forgo the preparation of market reports and non-binding price formulas if a CR Program crab fishery is unlikely to (and does not) open; (2) modifying the timeline for release of the non-binding price formula for the western Aleutian Islands golden king crab (WAG) and eastern Aleutian Islands golden king crab (EAG) fisheries; (3) modifying the information used in the market report and allowing AOs to mutually agree to modify the timing for release of the market report in each CR Program fishery; and (4) clarifying the authority of the AOs, market analyst, formula arbitrator, contract arbitrators, and third-party data provider to adopt additional arbitration system procedures that are not in conflict with arbitration system regulations. The need for and effect of each of these proposed actions are described in greater detail below.

#### *Action 1: Allow AOs To Forgo Preparation of Market Reports and Non-Binding Price Formulas if a Crab Fishery Is Unlikely To and Does Not Open*

This proposed action would allow AOs representing unaffiliated Class A IFQ holders and IPQ holders to mutually agree that when a crab fishery is unlikely to open, neither a market report nor a non-binding formula would be prepared for the fishery. If mutual agreement is reached, the proposed action would require the AOs representing unaffiliated Class A IFQ holders and IPQ holders to include provisions in the contracts with the market analyst and formula arbitrator that would reflect the mutual agreement of the AOs to forgo preparation of a

market report and non-binding price formula for the fishery; require preparation of the market report and non-binding price formula in the event that an opening is later announced for the fishery; and specify a timeline for the production of the market report and non-binding price formula, which must occur before June 30.

This proposed action would allow the AOs, and, by extension, the unaffiliated Class A IFQ and IPQ holders who are members of the AOs and who pay the costs for producing these reports, the option to forgo incurring expenses associated with the production of those reports when it appears unlikely that a fishery will open. The potential cost savings to the AOs could range from a few thousand to several tens of thousands of dollars. Additional details on the potential cost savings are provided in the analysis prepared for this proposed action.

Status of stocks for CR Program crab fisheries is assessed annually and it is possible that some CR Program crab fisheries will not open in a given year. For example, during the first five years of the CR Program, the western Aleutian Islands red king crab and Pribilof Islands red and blue king crab fisheries have failed to open, and the Saint Matthew Island blue king crab fishery has only been open during the 2009–2010 and 2010–2011 fishing seasons. Regardless of whether a fishery is scheduled to open, regulations at 50 CFR 680.20(e)(4)(ii) require that the market report and non-binding price formula must be prepared for each crab fishery no later than 50 days before the opening date for the first crab fishing season for that crab QS fishery. Because most crab fisheries have an October 15 season opening date, most of the market reports and non-binding price formulas must be produced by August 26 each year. However, in most cases, the State of Alaska does not announce whether a CR Program crab fishery will be open or closed until October 1.

The proposed action would allow the AOs to mutually agree to forgo the production of the market report and non-binding price formula if a fishery is unlikely to and does not open. This agreement would be required to be included in the contract the AOs establish with the market analyst and formula arbitrator. If the AOs mutually agree to include this provision in their contract with the market analyst and the formula arbitrator, the contract would also have to require the production of the market report and non-binding price formula in the event that a fishery previously not anticipated to open does actually open. The proposed regulations

at §§ 680.20 (f) and (g) would leave the details about the timeline for producing these reports in the event of a fishery opening to the mutual agreement of the AOs, only requiring that the market report and non-binding price formula be produced prior to June 30. The mutual agreement to forgo the issuance of a market report would need to be incorporated into the contract with the market analyst.

Regulations at § 680.20(e)(5) require that the AOs provide NMFS with the names of the persons serving as the market analyst and provide copies of the contracts with the market analyst and formula arbitrator no later than June 1 of each year. Therefore, the contract with the market analyst and formula arbitrator, including any terms that would allow forgoing the production of a market report and non-binding price formula for a fishery, would need to be incorporated in the contract between the AOs and the market analyst no later than June 1. If the AOs could not reach mutual agreement on these terms by June 1, then the existing regulatory requirements to produce a market report and non-binding price formula no later than 50 days before a fishery opening would apply.

As discussed above, because most fisheries have an October 15 opening date, this would require most market reports to be produced no later than August 26. The Council recommended this approach so that AOs unable to reach mutual agreement on whether to forgo production of market reports and non-binding price formula would have sufficient time to comply with the 50-day requirements at § 680.20 for their production.

The Council determined, and NMFS agrees, that production of a market report for fisheries unlikely to open is unnecessary and presents a financial burden to fishery participants. Elimination of the requirement to produce a market report for fisheries unlikely to open presents a minor risk that participants in a fishery will have inadequate information to inform price negotiations in the event that a fishery unexpectedly opens; however, NMFS agrees with the Council that this risk is mitigated by the requirement that AOs develop a contingency plan for describing how a market report will be produced when a fishery unexpectedly opens or when AOs disagree concerning whether a fishery will open.

#### *Action 2: Modify the Timing for Release of the Aleutian Islands Golden King Crab Fishery Non-Binding Price Formula*

Under current State regulations, the EAG and WAG fisheries open on August 15 of each year. This opening date means that the non-binding price formula developed for both fisheries must be released no later than June 26, as current regulations require that the formula be released at least 50 days prior to the opening date for these fisheries. However, the opening date for the EAG and WAG fisheries prevents the formula arbitrator from using the most current information from the Commercial Operators Annual Report (COAR), which is a key source of information on wholesale prices used in the non-binding price formula. COAR documents are typically not available until early July; therefore, data from the preceding season is not incorporated in the non-binding price formula. Testimony to the Council from the formula arbitrator, the unaffiliated Class A IFQ and IPQ AOs, and participants in these fisheries indicate that delaying the issuance of the non-binding price formula until the most recent COAR is available would provide more informative and useful reports for price negotiations.

This proposed action would amend the existing regulations at § 680.20(g) to require the non-binding price formula be released at least 30 days prior to the start of these fisheries to provide the formula arbitrator time to incorporate data from the most recent COAR. Fishery participants testifying to the Council indicated that producing the non-binding price formula at least 30 days prior to the start of the fisheries, rather than at least 50 days prior to the start of the fisheries, would not be expected to adversely affect price negotiations. Participants in the fisheries noted that a more complete and current non-binding price formula using COAR data from the most recent EAG and WAG fisheries would outweigh any potential disadvantage of a slightly shorter period of time to review the non-binding price formula before fishing begins. The Council determined and NMFS agrees that this proposed action would provide the affected fishing industry with the most recent data for use in the non-binding price formula while providing as much lead time as possible before the start of the fisheries for consideration of the non-binding price formula in any potential negotiations.

*Action 3: Modify the Information Used and Timing for Release of the Market Report*

Existing regulations at § 680.20(f) require that the market report be released no later than 50 days prior to the opening of a fishery and that it cannot be supplemented with additional information once released. Existing regulations permit the inclusion of publicly available information, as well as data from proprietary sources in the market report. The CR Program established the 50-day release date and prohibition on subsequent supplements to the market report to reduce the risk that the market report could contain proprietary data released during a fishing season. Any such data could unduly influence the results of the market report by creating incentives for processors or harvesters to present data that cannot be reviewed publicly and have that data incorporated in a manner that would influence the results of the market report for the benefit of one party, thereby increasing the risk of tainting the market report with information that could be used for anticompetitive purposes.

To address these concerns, regulations at § 680.20(f)(2)(v) require that any price information contained in the market report: (1) Include only data that is based on information regarding activities occurring more than three months prior to the generation of the market report; (2) include only statistics for which there are at least five providers reporting data upon which each statistic is based and for which no single provider's data represents more than 25 percent of a weighted basis of that statistic; and (3) be sufficiently aggregated such that any information disseminated in the market report would not identify specific price information by an individual provider of information. These provisions are intended to prevent the use of private information in the report that could skew the conclusions reached by the market analyst in a manner that might benefit a specific private interest and could therefore be anticompetitive.

While these requirements limit the potential for a harvester or processor to submit data for his or her benefit, these requirements also limit the usefulness of the market report because much of the data contained in the report are no longer indicative of market conditions by the time the market report is released. Furthermore, aggregation of data across five or more sources may not always be possible in the small market of crab producers, limiting the availability of data from private sources

for any market report. Because of these concerns, representatives of the unaffiliated Class A IFQ and IPQ AOs recommended several changes to the market report.

The AOs recommended that, by at least 50 days prior to a fishery opening, the AOs representing the unaffiliated Class A IFQ and IPQ holders should be permitted to mutually agree to the timeline for release of the market report, and that these AOs could mutually agree to allow supplements to the market report at any time prior to June 30. Additionally, the AOs recommended that the market report use only publicly available information and that the AOs be provided discretion in recommending contents of the market report. The Council agreed that the current requirement for market reports to be complete at least 50 days prior to the season prevents inclusion of the most current and relevant pricing information and that the prohibition on supplements to the report prevents subsequent report modification to provide useful market information inseason or after completion of the initial report. The Council concurred with the AOs that market reports would be more timely and informative if those reports can be produced and supplemented at any time and recommended that the market report contain only publicly available information to reduce the risk that any information provided by a private source could taint the market report for anticompetitive purposes. For the purposes of this proposed action, publicly available information means data and information published in a manner that makes them available, either for a fee or at no cost, to the public at large. The Council also recommended allowing the AOs to negotiate the timing of release of the market report and the inclusion of any supplements to enhance the timeliness, accuracy, and usefulness of the market report.

NMFS agrees with the Council that the flexibility afforded by this proposed action should allow AOs to provide the most useful, timely information to participants in need of market information for price negotiations. This proposed action presents some risk that majority QS and PQS holders could assert their position in the AOs to provide a market report that is not particularly beneficial to holders of relatively small amounts of QS or PQS, and who may be likely to derive the greatest benefit from the market reports. The Council and NMFS find the risk to be minor and that the benefits of the

proposed action outweigh this slight and unlikely risk.

To be consistent with the Council's recommendations, this proposed action would amend regulations at § 680.20(f) to remove the ability for IFQ and IPQ holders to submit proprietary data for inclusion in the market report, require that the information that the market analyst considers be publicly available, and allow AOs to mutually agree to negotiate the content and the timing for release of the market report. As with Action 1, while the proposed regulations would allow the AOs to mutually agree to a date for release of the market report, regulations would require release of the market report prior to June 30. NMFS also proposes to amend regulations at § 680.20(f) to clarify that if the AOs cannot mutually agree to the contents, timing for release, or a provision addressing whether any supplements for the market report will be permitted, the market report would have to be released 50 days prior to the start of a crab fishery, and supplements to the market report would not be permitted. This would ensure that a market report will be prepared for each fishery if the AOs cannot reach mutual agreement. The Council recommended that existing requirements should apply if mutual agreement is not possible to ensure that all parties have some market report available for consideration during price negotiations even if the data in that report may not be as current as that available later in the year.

*Action 4: Clarify the Authority of the AOs, Market Analyst, Formula Arbitrator, Contract Arbitrators, and Third-Party Data Provider*

The arbitration program established by the CR Program requires AOs to enter into a series of contracts with harvesters, processors, market analysts, arbitrators, and, if desirable, a third-party data provider. Regulations require each of these contracts to contain several specific provisions. However, the regulations do not specify all aspects of the arbitration system. For example, regulations at §§ 680.20(f) and (g) do not provide specific details about how the market reports and non-binding price formula documents should be released, how specific data-quality issues within these documents should be considered and addressed, or how new information should be incorporated. Because the regulations are specific on certain requirements and silent as to other aspects, arbitration administrators (*i.e.*, the AO representatives, contract arbitrators, formula arbitrators, market analysts, and third party data providers) have questioned their authority to agree

to provisions or develop procedures that could improve the arbitration program but that are not explicitly contained in regulation. Absent a regulation that clearly specifies this authority, it could be argued that these actions are beyond the scope of an arbitration administrator's powers.

As a result, arbitration administrators have expressed some concern that potential liability could influence decisionmaking. For example, if an arbitrator is concerned that a participant may litigate if the arbitrator makes a certain finding, the arbitrator's independence could be compromised. Likewise, arbitration organizations might choose not to make changes in the arbitration structure that are agreed to by participants in both harvesting and processing sectors, but are not addressed by the regulations, if they fear potential lawsuits related to those changes. At the extreme, the threat of liability could make it difficult to find persons willing to perform arbitration services.

Although not specifically stated in the regulations originally developed to implement the CR Program, a review of the EIS prepared for the CR Program supports the conclusion that the Council intended for arbitration administrators to have the discretion to adapt the arbitration system to address perceived problems in program administration. Specifically, the EIS notes that administration of the arbitration system "would be undertaken primarily by industry, avoiding government involvement in the price setting process and providing greater flexibility to adopt agreed to modifications without government action."

This flexibility was viewed by the Council and NMFS as necessary to avoid time consuming and costly processes of the Council and NMFS to amend the program through the standard regulatory process. The Council believed that broader administrative authority by the arbitration administrators would improve the efficiency of administration of the arbitration system. Although many industry participants have argued that the arbitration administrators have broad authority to adopt provisions to improve the operations of the arbitration system, absent a regulation clearly specifying this authority, it could be argued that these actions are beyond the scope of their powers.

For these reasons, the Council recommended that the regulations be modified to specifically state that arbitration administrators have the authority to establish procedures and

make administrative decisions concerning the arbitration program that are in addition to those requirements specified in regulation, provided those actions are not in conflict with any of the regulatory requirements. NMFS agrees with the Council's recommendations and proposes this additional clarification in a new paragraph at § 680.20(i). This proposed clarification of authority is intended to remove any inhibitions of arbitration administrators to adopt procedures and make decisions that would improve the operation of the arbitration system.

#### **Expected Effects of the Proposed Action**

The RIR describes the predicted effects of the proposed action on harvesters, processors, arbitration administrators, communities, management and enforcement, consumers, and the nation. Only the effects of the proposed action on harvesters, processors, and arbitration administrators are described here. Overall, this action would be expected to slightly reduce the costs for harvesters and processors to comply with the arbitration system requirements by eliminating the requirements that market reports and non-binding price formulas be prepared for fisheries that are not open for fishing, provide a more timely and useful non-binding price formula for the eastern and western Aleutian Islands golden king crab fisheries, provide more timely and useful market reports that may be used during price negotiations between harvesters and processors, and provide additional flexibility and clarity for the arbitration administrators when establishing policies and procedures not detailed in the regulations.

A minor overall net benefit to the Nation is likely to arise from this proposed action. Action 1 is likely to decrease costs, Actions 2 and 3 are likely to improve the quality and timing of information provided to participants in the arbitration system, and Action 4 is likely to provide additional clarity for arbitration administrators. Overall, this proposed action would most benefit unaffiliated Class A IFQ and IPQ holders participating in the arbitration system.

#### **Summary of Regulatory Changes**

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

- Modify § 680.20(f)(1) to permit AOs by mutual agreement to include a provision in the contract with the market analyst to forgo the production of a market report if a crab fishery is not anticipated to open for fishing. If such

a provision is included in the contract with the market analyst, the contract must also contain provisions to require the market analyst to produce a market report before June 30 in the event that the fishery that was not anticipated to open does subsequently open for fishing. In the absence of such an agreement and contract provisions, a market report would be required to be produced for that crab fishery no later than 50 days before the start of a crab fishery;

- Modify § 680.20(f)(2) to require that a market report contain only publicly available data, and that the AOs could, by mutual agreement, include a provision in their contract with the market analyst that would permit the production of supplemental reports for a fishery. The contract with the market analyst would have to specify the terms under which supplements to the market report would be produced if such a provision is included in the contract;

- Modify § 680.20(f)(4) to permit AOs, by mutual agreement, to include a provision in the contract with the market analyst that would allow the production of the market report for a crab fishery on a schedule that differs from the regulatory requirement to produce a market report not later than 50 days before the start of a crab fishery. If such a provision is included, the contract with the market analyst would have to specify the terms under which a market report would be produced and would have to require the release of the market report prior to the close of the fishery. In the absence of such an agreement by the AOs, the contract with the market analyst would require the production of a market report no later than 50 days before the start of a crab fishery;

- Modify § 680.20(f)(4)(ii) to specify that the Market Analyst is providing the Market Report. This modification was not a part of the Council's action on Amendment 30, but this proposed regulatory amendment is an appropriate opportunity to correct the lack of specificity in this paragraph;

- Modify § 680.20(g)(1) to permit AOs, by mutual agreement, to include a provision in the contract with the formula arbitrator to forgo the production of a non-binding price formula if a crab fishery is not anticipated to open for fishing. If such a provision is included, the contract must also contain provisions that would require the formula arbitrator to produce a non-binding price formula before June 30 in the event that a fishery that was not anticipated to open does subsequently open for fishing. In the absence of such an agreement and

contract provisions, a non-binding price formula would be required to be produced for that crab fishery no later than 50 days before the start of a crab fishery;

- Modify § 680.20(g)(2) to require that the non-binding price formula produced for the western Aleutian Islands golden king crab fishery and the eastern Aleutian Islands golden king crab fishery be produced no later than 30 days prior to the start of those crab fisheries; and

- Add paragraph (i) to § 680.20 to clarify that arbitration administrators may establish procedures, policies, and make administrative decisions concerning the administration of the arbitration system that are in addition to regulatory requirements, provided those procedures, policies, or administrative decisions are not otherwise in conflict with any requirement contained in the arbitration system regulations.

### Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this proposed rule is consistent with Amendment 30, the Magnuson-Stevens Fishery Conservation and Management 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. The RIR/IRFA prepared for this proposed rule incorporates by reference an extensive RIR/FRFA 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 the 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.

Under each of these actions, holders of CVO QS and holders of PQS would be regulated in the contracts that they must establish as a condition of receiving Class A IFQ and IPQ, respectively. The holders of these shares are the entities that are directly regulated by this action. Of the estimated 221 QS holders in the fisheries, 210 are estimated to be small entities. Of the estimated 25 PQS holders, 17 are estimated to be small entities.

All of the directly regulated persons would be expected to benefit from this action relative to the status quo alternative because the proposed action is expected to reduce the costs of compliance with the arbitration system, provide more timely and useful market reports and non-binding price formulas for use in negotiations, and provide clarity concerning the administration of the arbitration system.

Among the two alternatives considered for each of the four proposed actions, the Council and NMFS determined that the proposed actions would best minimize potential adverse economic impacts on the directly regulated entities. Action 1 Alternative 1, the status quo alternative, would continue to require that a market report and non-binding price formula be prepared for a crab fishery that is closed to fishing. Alternative 2, the proposed action, would provide the AOs with the discretion not to produce a market report and non-binding price formula if a fishery does not open, thereby reducing costs to the quota holders directly regulated.

No additional alternatives were analyzed because both a market report and non-binding price formula are prepared or they are not, and an additional alternative would not be necessary or appropriate to address the proposed action. Alternatives that would rely on preliminary notice from State of Alaska fishery managers of intent to close a fishery, after which arbitration organizations would not be required to contract for a market report or non-binding formula for that fishery were considered and not analyzed. The need for formal notice from fishery managers could be misinterpreted and disruptive to planning for fishing in the upcoming fishing season. Additionally, alternatives that would create a strict timeframe for applying the exemption, as well as for producing the market report and non-binding formula were considered and not analyzed. These alternatives are believed to be overly restrictive and administratively

burdensome, limiting the ability of arbitration organizations to appropriately respond to changes in circumstances in providing the reports and formulas.

Action 2 Alternative 1, the status quo alternative, would continue to require that a non-binding price formula for the eastern and western Aleutian Islands golden king crab fisheries be prepared at least 50 days prior to the fishery openings. Alternative 2, the proposed action, would require that a non-binding price formula be prepared at least 30 days prior to the fishery opening, thereby ensuring that relevant price information can be incorporated in the non-binding price formula.

No additional alternatives were considered because the AOs and formula arbitrator stated that a minimum of 30 days between the release of the non-binding price formula and the start of the season is required to provide harvesters and processors with the time necessary to review the non-binding price formula, and an additional alternative would not be necessary or appropriate to address the proposed action.

Action 3 Alternative 1, the status quo alternative, would continue to require that market reports be released at least 50 days prior to the opening of a fishery, that they not be supplemented with additional information once released, and that they be based on publicly available information, as well as data from proprietary sources within certain parameters described in the preamble. Alternative 2, the proposed action, would provide the AOs with the discretion to mutually agree to negotiate the timing for release of a market report and to include any supplements to help provide a timely, accurate, and more useful product. Alternative 2 also would require that the information that the market analyst considers be publicly available.

No additional alternatives were analyzed because Alternative 2 provides the AOs with the discretion to determine the timing of the report and the need to produce supplements if required. An alternative that would fix a specific date for the production of a market report and any supplements, or that required the use of proprietary data, would fail to address the purpose of this proposed action, which is to provide a timely and complete report as needed by the participants in the arbitration system. These alternatives were believed to be overly prescriptive, limiting the ability of arbitration organizations to agree to terms for the production of market reports that would be most useful and informative to

fishery participants. In addition, an alternative to remove the requirement for any market report was also considered, but not analyzed. The market report is thought to provide beneficial baseline market information for negotiations. In addition, small, independent participants in the program are thought to derive benefit from information in the market report which might otherwise be costly for them to gather. As a consequence, the alternative to remove the market report requirement was determined to be inconsistent with the basic program objectives for price arbitration in the CR Program fisheries.

Action 4 Alternative 1, the status quo alternative, would not provide any additional clarity to arbitration administrators on their ability to establish policies and procedures not specifically described in existing regulations at § 680.20. Alternative 2, the proposed action, would clarify that AOs can establish procedures and make administrative decisions concerning the arbitration program that are not explicitly specified in the regulations provided those actions are not in conflict with any requirement contained in the arbitration system regulations.

An alternative that would grant immunity to arbitration administrators for their actions taken in the administration of the arbitration system was considered, but not analyzed. Regulations that grant arbitral immunity would effectively restrict the ability of courts to adjudicate certain actions against specific persons. While there are clear benefits to arbitration systems from arbitral immunity, and courts have applied arbitral immunity for arbitrators and arbitration organizations, it is uncertain whether the Magnuson-Stevens Fishery Conservation and Management Act authorizes NMFS to promulgate regulations that grant such immunity. The Council stated its belief that the preferred alternative (by clarifying the scope of authority of arbitration administrators) would strengthen any argument that common law or other immunity should be extended to any acts taken to administer the arbitration program (including the development of arbitration procedures).

The proposed actions in this rule would modify existing recordkeeping and reporting requirements, but do not propose any additional recordkeeping and reporting requirements. Specifically, the proposed actions would modify the timing, preparation, and release of information used in the market reports and non-binding price formulas. The analysis revealed no Federal rules that would conflict with,

overlap, or be duplicated by the alternatives under consideration.

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval under OMB Control No. 0648-0516. Public reporting burden for the market report is estimated to average four hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Alaska Region (the address is available in the **ADDRESSES** section), and e-mail to *OIRA\_Submission@omb.eop.gov*, or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

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

Alaska, Fisheries.

Dated: August 3, 2011.

**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 § 680.20,

a. Revise paragraphs (e)(4)(i), (e)(4)(ii), and (f)(1);

b. Revise paragraphs (f)(2) introductory text, and paragraphs (f)(2)(i) and (f)(2)(ii), and remove paragraphs (f)(2)(iii) through (v);

c. Redesignate paragraphs (f)(2)(vi) through (f)(2)(viii) as paragraphs (f)(2)(iii) through (f)(2)(v) respectively, and revise newly redesignated paragraph (f)(2)(v);

d. Revise paragraphs (f)(4)(i), (f)(4)(ii), and (g)(1);

e. Revise paragraph (g)(2)(viii)(B); and

f. Add new paragraph (i) to read as follows:

#### **§ 680.20 Arbitration system.**

\* \* \* \* \*

(e) \* \* \*

(4) \* \* \*

(i) For each crab fishing year, QS holders who are members of Arbitration QS/IFQ Arbitration Organization(s) and PQS holders who are members of PQS/IPQ Arbitration Organization(s), by mutual agreement, will select one Market Analyst, one Formula Arbitrator, and Contract Arbitrator(s) for each crab QS fishery. The number of Contract Arbitrators selected for each fishery will be subject to the mutual agreement of those Arbitration Organizations. The selection of the Market Analyst and the Formula Arbitrator must occur in time to ensure the Market Report and non-binding price formula are produced within the time line established in paragraphs (f)(4)(i) and (g)(2)(viii)(B) of this section.

(ii) The Arbitration Organizations representing Arbitration QS holders and PQS holders in a crab fishery shall establish by mutual agreement the contractual obligations of the Market Analyst, Formula Arbitrator, and Contract Arbitrator(s) for each fishery. The contractual obligations of the Market Analyst, the formula Arbitrator and Contract Arbitrators will be enforced by the parties to the contract.

\* \* \* \* \*

(f) \* \* \*

(1) Except as provided in paragraph (f)(1)(ii) of this section:

(i) The Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations shall establish a contract with the Market Analyst to produce a Market Report for each crab QS fishery. The terms of this contract must specify that the Market Analyst must produce a Market Report that shall provide an analysis of the market for products of that fishery.

(ii) The Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations may, by mutual agreement, include a provision in the contract with the Market Analyst to forgo production of a Market Report

for a crab QS fishery if the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations anticipate that the crab QS fishery will not open for fishing during a crab fishing year. If such a provision is included in the contract with the Market Analyst, the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations must include a provision in the contract with the Market Analyst to produce a Market Report not later than June 30 for the crab QS fishery that was expected to remain closed but subsequently opens for fishing during the crab fishing year.

(2) The contract with the Market Analyst must specify that:  
(i) The Market Analyst will base the Market Report on a survey of the market for crab products produced by the fishery.

(ii) The Market Analyst will note generally the sources from which he or she gathered information. The Market Report must include only publicly available data and information. Data and information will be considered publicly available if they are published in a manner that makes them available, either for a fee or at no cost, to the public at large.

(v) The Market Analyst must not issue interim or supplemental reports for any crab QS fishery unless the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations, by mutual agreement, include a provision in the contract with the Market Analyst for the production of interim or supplemental reports for a crab QS fishery. If the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations have a mutual agreement to produce interim

or supplemental reports, the contract with the Market Analyst must specify the terms and conditions under which those interim or supplemental reports will be produced.

(4) \* \* \*  
(i) In all subsequent years and except as provided in paragraph (f)(1)(ii) of this section, the Market Report for each crab QS fishery must be produced not later than 50 days prior to the first crab fishing season for that crab QS fishery, unless the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations, by mutual agreement, include a provision in the contract with the Market Analyst to establish a different date for production of the Market Report for that crab QS fishery.

(ii) The contract with the Market Analyst must specify that the Market Analyst will provide the Market Report in that crab fishing year to:

(g) \* \* \*  
(1) Except as provided in paragraph (g)(1)(ii) of this section:

(i) The Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations shall establish a contract with the Formula Arbitrator to produce a Non-Binding Price Formula for each crab QS fishery.

(ii) The Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations may, by mutual agreement, include a provision in the contract with the Formula Arbitrator to forgo production of a Non-Binding Price Formula for a crab QS fishery if the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations anticipate that the crab QS fishery will not open

for fishing during a crab fishing year. If such a provision is included in the contract with the Formula Arbitrator, the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations must include a provision in the contract with the Formula Arbitrator to produce a Non-Binding Price Formula not later than June 30 for the crab QS fishery that was expected to remain closed but subsequently opens for fishing during the crab fishing year.

(2) \* \* \*  
(viii) \* \* \*  
(A) \* \* \*

(B) In all subsequent years and except as provided in paragraph (g)(1)(ii) of this section, the Non-Binding Price Formula must be produced not later than 50 days prior to the first crab fishing season for that crab QS fishery, except that the Non-Binding Price Formulas for the western Aleutian Islands golden king crab fishery and the eastern Aleutian Islands golden king crab fishery must be produced not later than 30 days prior to the first crab fishing season for those crab QS fisheries.

(i) *Other Procedures, Policies, and Decisions.*

The arbitration organizations, market analysts, arbitrators, or third party data providers are authorized to adopt arbitration system procedures, including additional provisions in the various contracts, provided those procedures are not inconsistent with any other provision in the regulations.