

# **Initial Review Draft**

## **REGULATORY IMPACT REVIEW**

**and**

## **INITIAL REGULATORY FLEXIBILITY ANALYSIS**

### **MODIFICATIONS TO COMMUNITY PROVISIONS**

For a proposed Regulatory Amendment to  
Implement Amendment \_\_\_\_ to the Fishery Management Plan for  
Bering Sea and Aleutian Islands King and Tanner Crabs

October 2012



## EXECUTIVE SUMMARY

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the “program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers actions intended to address the following five concerns:

- 1) the relatively short period of time allowed for exercising and performing under the right;
- 2) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies;
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community;
- 4) the limited protection to community interests by the right of first refusal; and
- 5) the need for better notices to communities entities and NOAA Fisheries to track use and transfer of shares subject to the right.

### Purpose and Need Statement

The Council has adopted the following purpose and need statement for these actions:

*The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.*

*To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now holding **between 20 percent and 50 percent of the PQS<sup>1</sup>** in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.<sup>2</sup>*

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<sup>1</sup> The Council should consider revising this clause to state that community organizations “hold substantial portions of the PQS in each rationalized fishery.” Although it is possible that organization holdings reach these levels in some fisheries, in some cases holdings are indirect. In addition, some holdings of PQS on which a community entity has never held a right of first refusal. Given these circumstances, the statement as written may not be fully accurate or may be misconstrued by readers. A more general statement may address these concerns.

<sup>2</sup> The Council should consider revision of the purpose and need statement to identify the need to improve notices of transfers and IPQ usage to community entities and NOAA Fisheries.

## **Alternatives**

The Council has identified five actions for this amendment package. Under Action 1, the time available for a community entity to exercise a right of first refusal would be extended from 60 days to 90 days, and the time for a community entity to perform under the contract would be extended from 120 days to 150 days.<sup>3</sup> Action 2 could be used to address two provisions. First, the action could be used to continue rights of first refusal regardless of whether IPQ are used outside of the community from which those shares originated. Under the current rule, the right expires if IPQ are used outside that community for three consecutive years. The action could also be used to change the community that benefits from the right, in the event a community entity fails to exercise the right on a transfer to which the right applies. Under this alternative, the new PQS holder would be permitted to identify the community that would benefit from the right, by selecting one of the community entities qualified to hold a right of first refusal. Options would either allow or prohibit the entity holding the right at the time of the transfer from being identified as the future right holder. Action 3 could be used to apply a community entity's right to either the subject PQS only or to the subject PQS and assets located in the community intended to benefit from the right of first refusal. The current rule applies the right to any assets included in the transaction with the subject PQS, which may include any assets outside of the community. Under Action 4, a PQS holder could only use IPQ yielded by PQS in the community that benefits from the right of first refusal, unless the community benefiting from the right consents to the use of the IPQ outside that community. Currently, IPQ may be used by the PQS holder in any location (subject to any applicable regional landing requirement). Action 5 would create new notice requirements intended to ensure that the right holder and NOAA Fisheries have adequate information to track use of IPQ and transfers of IPQ and PQS as needed to protect their interests under the right.

### **Effects of Action 1 – Increase the time for exercise and performance of the right of first refusal**

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that extending the period to exercise a right and perform under the contract could be beneficial to entities making that decision. The extension is likely to be particularly beneficial for communities that adopted provisions for public notice and meetings to decide whether to exercise the right. Even this extended time period, however, is likely to pose a challenge, for large transactions that include a variety of assets other than the subject PQS. Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the community entity and to use a portion of the IPQ yielded by the PQS in the community for a period of years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may reduce the difficulty posed by the time period extensions to PQS holders. As a result, the proposed time period extensions are likely to have only minor effects on PQS holders, the parties with which they might transact, and community entities.

### **Effects of Action 2 – Removing the provision under which the right lapses after use of the IPQ outside the community for three years and establishing a new right, if the original right holder elects not to exercise the right**

This action could revise two provisions. The first part would remove a provision under which rights lapse if the IPQ are used outside the community for three consecutive years. So, once the right is triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded

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<sup>3</sup> Unless specified otherwise, all references to days in this document refer to **calendar** days.

IPQ had been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in the community that attracted the processing. At the extreme, this dependence could be established through several years of processing activity. Extending the right without the lapse for use outside the community would reflect an interest in protecting the community from which the PQS originated, at the potential expense of other communities that might have developed a subsequent dependence on process of those shares.

The second part of this action would modify a provision under which rights lapse if the right is triggered by a transfer and the community entity fails to exercise the right. Under the first action alternative, the right would be extended for the same entity, regardless of the failure of that entity to exercise the right when it was triggered. Since the right is only triggered by transfer in which the recipient intends to use the shares outside the community, this change could result in an entity intervening in a transaction for PQS in which another community has developed a dependency. In addition, an entity could have multiple opportunities to exercise a right. Providing multiple opportunities could be viewed by some as unnecessary, since the community would have allowed transfers to transpire without intervening. On the other hand, the extension could benefit entities that allow transfers only because of their inability to exercise their rights. These future opportunities to exercise the right may be important, if the circumstances and financing of the community entity change or the second transaction is on more appealing terms, which could occur if fewer PQS are included in the transaction or prices change. Those entities may later develop the capacity to exercise rights. The second action alternative would allow the new PQS holder to designate a new right holder (after a transfer to which the right applies, but on which the right is not exercised). Allowing the PQS holder to designate the new right holder is intended to streamline administration (as dependence based criteria could be administratively cumbersome). Since use of the shares would be at the discretion of the PQS holder, that holder should be best situated for identifying the community that would be dependent on the shares in the future. Although it is not certain what criteria the PQS holder would use to select a community, selecting the community in which the PQS holder intends to use the shares might avoid complications that could arise from the application of the right to future transfers.

The action is intended primarily to benefit communities and their representative entities; however, PQS holders are also affected by these extensions of the right. To the extent that rights of first refusal diminish the value of PQS, that diminution would be perpetuated by extending the right. Despite the existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the right holding community to the extent required for avoiding triggering the right. In the long run, meeting this minimal requirement may be more difficult, particularly if processing activity is discontinued in some communities. To the extent that the right is intended to protect community interests, that protection may be lacking under the status quo, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares. In addition, communities that become reliant on these allowed movements of processing activity are unprotected by the right in its current form.

### **Effects of Action 3 – Apply the right of first refusal to only subject processor shares or subject processor shares and assets in the community of the entity holding the right**

Under the status quo, rights of first refusal apply to all assets included in a transaction that includes processor shares subject to the right of first refusal. Under the first action alternative, right of first refusal contracts would be required to provide that the right shall apply to only the PQS. In the event assets other

than PQS are included in the proposed sale, the price of the PQS shall be determined by an appraisal process.

PQS holders are likely to respond to the application of the right to only PQS in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement, the PQS holder may need to provide something of value to the entity, which could be financial remuneration or a portion of the PQS. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but the community could receive some compensation for the security it provides in exchange for its agreement to allow the sale. CDQ groups that represent communities are likely to be better positioned to exercise the right than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests. Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the required period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.<sup>4</sup> To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. Lastly, a PQS holder that is undertaking a transaction might also subdivide the transaction. One transaction could be for the PQS; the other transaction would be for any other assets. By subdividing the transaction in this manner, the PQS holder and the buyer may attempt to ensure that the price of PQS and the price of other assets in the transaction are set at an acceptable level, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS carrying the bulk of the value of the transaction. Although a right holder may contest the contract price for the PQS, the use of that process could be costly. Clearly, a variety of contractual arrangements might be made to increase the potential for the PQS holder to receive reasonable value for assets (including the PQS), particularly in cases where the value of the assets is highly dependent on the accompanying PQS. Given the costliness of any administrative process associated with determining a price for assets subject to the right and the potential for PQS holders to avoid triggering the right, it is questionable whether the action alternatives would provide substantially greater protection of community interests than the existing right.

Under the second action alternative, the right of first refusal would apply to processor shares and any assets based in the community benefiting from the right that are included in the transaction with the processor shares. In the event that this alternative is adopted, the Council must define a standard for determining items that are subject to the right (i.e., assets that are "community-based"). Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. If the Council wishes to proceed with this alternative, a standard would need to be defined for determining the assets based in a community to which the right would apply. The current motion suggests that an arbitrator or appraiser could be used to make this determination, but a specific process and timeline are not specified. Those aspects of the alternative require additional attention.

Assuming that assets to which the right will apply are well defined, the process for establishing a price for those assets (independent of other assets included in the transaction but excluded from the right) must be considered. As suggested in the motion, a jointly selected appraiser (or team of appraisers would be used).

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<sup>4</sup> This choice may be unavailable, if the Council elects to extend the right in perpetuity.

The time for selection and performance of appraisers and its effect on the timeline for exercising a right and performing under the contract should be considered.

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS (and possibly community based assets) in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement the PQS holder may need to provide something of value to the entity, which could be financial remuneration or a portion of the PQS. A community entity may have little leverage in this negotiation if the PQS holder knows that the entity is without the wherewithal to exercise the right, but the community could receive some compensation for the security it provides in exchange for its agreement to allow the sale. CDQ groups that represent communities are likely to be better positioned to exercise the right than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests. Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the required period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.<sup>5</sup> To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. Lastly, a PQS holder that is undertaking a transaction might also subdivide the transaction. One transaction could be for the PQS and associated community based assets; the other transaction would be for any other assets. By subdividing the transaction in this manner, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets in the transaction are set at an acceptable level, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS and community based assets carrying the bulk of the value of the transaction. Although the motion suggests a process that would allow a right holder to contest the price, the use of that process could be costly. Clearly, a variety of contractual arrangements might be made to ensure that the PQS holder receives reasonable value for assets (including the PQS), particularly in cases where the value of the assets is highly dependent on the accompanying PQS. Given the costliness of any administrative process associated with determining a price for assets subject to the right and the potential for PQS holders to avoid triggering the right, it is questionable whether the action alternatives would provide substantially greater protection of community interests than the existing right.

#### **Effects of Action 4 – Require consent of the community benefiting (or formerly benefiting) from the right to use IPQ outside of the community**

Under the status quo, a PQS holder may use the IPQ yielded by its PQS in any location that it chooses (provided it complies with regional landing requirements). This flexibility allows PQS holders to derive the maximum value from their PQS, choosing where and how to process IPQ, with limited geographic constraints. Thus, PQS holders have the option to move processing between communities to other plants that they own or through leasing or custom processing arrangements with other plant owners. This flexibility also allows a PQS holder to both derive greater value from their IPQ and to address contingencies that could arise in season, such as plants being disabled or inaccessible.

While this flexibility to use PQS in any location (within a permitted region) benefits its holders, it also creates some uncertainties for communities that have developed dependency on processing of crab for economic activity and tax revenues. The use of IPQ outside of the community from which those IPQ

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<sup>5</sup> This choice may be unavailable, if the Council elects to extend the right in perpetuity.

historically originated (particularly on a large scale) may deprive a community of benefits. Transfer of the use of small amounts of IPQ outside of a community would likely only reduce tax revenues of the community (as the economic activity arising from marginal amounts of IPQ is likely to be minimal). The movement of larger amounts of IPQ from a community will likely have a broader effect on a community. Not only are tax revenues affected, but also economic activity in the community that is generated by activity at the plant, vessels making deliveries and their crews, and processing employees. This activity often sustains support businesses that are a critical part of the economies of most communities with processing.

The action alternative would require IPQ processing to occur in the community that benefits from the right of first refusal unless that right holding entity consents moving IPQ processing. While the action would strengthen the position of these entities considerably, the action would affect the ability of processors (and possibly harvesters) to achieve efficiencies and derive benefits from the fisheries. Processing consolidation to realize production efficiencies could only take place if agreed to by an entity. End of season consolidation of small amounts of remaining IFQ (and IPQ) in a single trip could require the consent of several communities. In addition, any attempt to respond to an emergency or redirect a landing that might be prevented by an unforeseen circumstance would only be possible with community consent. Even if these consents are reasonable granted, delays could arise, if communities are unable to respond to requests quickly. In deciding this action, these operational concerns should be balanced against community interests that some may believe are not adequately protected under the current program measures.

**Effects of Action 5 – Require notices to the community entity and NOAA Fisheries concerning the use and transfer of shares subject to the right**

Currently, right holders have little information on the use of IPQ that are subject to the right. In addition, NOAA Fisheries may not be aware of a right holder's contention that a right has lapsed from use of IPQ outside of the community that benefits from the right and may not know whether PQS holders have provided a right holder with either the ability to exercise the right or a new agreement extending the right. The fifth action would provide additional notices to NOAA Fisheries and right holders, as well as require PQS holders to certify that right holders have received an opportunity to exercise the right or a new agreement extending the right at the time of a transfer. These notices and certifications will impose a very slight burden on PQS holders, but will ensure that the public, fishery managers, and right holders have better information concerning the status of rights of first refusal and their effects.



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# 1 INTRODUCTION

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the “rationalization program”). The program is unique in several ways, including the allocation of processing shares<sup>6</sup> corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers measures intended to address the following five concerns:

- 1) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies;
- 2) the relatively short period of time allowed for exercising and performing under the right;
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community;
- 4) the limited protection to community interests by the right of first refusal; and
- 5) the need for better notices to communities entities and NOAA Fisheries to track use and transfer of shares subject to the right..

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of the alternatives to modify rights of first refusal established under the program. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.<sup>7</sup>

This document relies on information contained in the Bering Sea/Aleutian Islands Crab Fisheries Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/Social Impact Assessment (NMFS/NPFMC, 2004).<sup>8</sup>

## 2 REGULATORY IMPACT REVIEW

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

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

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<sup>6</sup> Processor shares include both Processor Quota Shares (PQS), which are long term privileges to receive annual allocations of Individual Processor Quota (IPQ), and IPQ. Annual IPQ are a privilege to receive a specific poundage of crab landings in that year (which represent a share of the TAC).

<sup>7</sup> The proposed action is a minor change to a previously analyzed and approved action and the proposed change has no effect individually or cumulatively on the human environment (as defined in NAO 216-6). The only effects of the action are the effects on the distribution of processor shares, and as a consequence, distribution of landings of crab under the program. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

<sup>8</sup> In addition, further information concerning the fisheries and regulatory structure at issue in this action are contained in North Pacific Fishery Management Council/AECOM (November 2010).

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

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

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

## 2.1 Purpose and Need Statement

The Council has adopted the following purpose and need statement for this action:

*The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.*

*To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning **between 20 percent and 50 percent of the PQS<sup>9</sup>** in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.<sup>10</sup>*

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<sup>9</sup> The Council should consider revising this clause to state that community organizations “hold substantial portions of the PQS in each rationalized fishery.” Although it is possible that organization holdings reach these levels in some fisheries, in some cases holdings are indirect. In addition, some holdings of PQS on which a community entity has never held a right of first refusal. Given these circumstances, the statement as written may not be fully accurate or may be misconstrued by readers. A more general statement may address these concerns.

<sup>10</sup> The Council should consider revision of the purpose and need statement to identify the need to improve notices of transfers and IPQ usage to community entities and NOAA Fisheries.

## 2.2 Description of Alternatives

The Council has identified five actions for this amendment package. Under Action 1, the time available for a community entity to exercise a right of first refusal would be extended from 60 days to 90 days, and the time for a community entity to perform under the contract would be extended from 120 days to 150 days.<sup>11</sup> Action 2 could be used to modify two provisions under which the right of first refusal expires. First, the action could be used to continue rights of first refusal regardless of whether IPQ are used outside of the community from which those shares originated. Under the current rule, the right expires, if IPQ are used outside that community for three consecutive years. The action could also be used to change the community that benefits from the right, in the event a community entity fails to exercise the right on a transfer to which the right applies. Under this alternative, the new PQS holder would be permitted to identify the community that would benefit from the right. Options would either allow or prohibit the entity holding the right at the time of the transfer from being identified as the future right holder. Action 3 could be used to apply a community entity's right to either the subject PQS only or to the subject PQS and assets located in the community intended to benefit from the right of first refusal. The current rule applies the right to any assets included in the transaction with the subject PQS, which may include any assets outside of the community. Under Action 4, a PQS holder could only use IPQ yielded by PQS in the community that benefits from the right of first refusal, unless the community benefiting from the right consents to the use of the IPQ outside that community. Currently, IPQ may be used by the PQS holder in any location (subject to any applicable regional landing requirement). Action 5 would create new notice requirements intended to ensure that the right holder and NOAA Fisheries have adequate information to track use of IPQ and transfers of IPQ and PQS as needed to protect their interests under the right.

The specific elements and options identified by the Council are:

### **Action 1: Increase a right holding entity's time to exercise the right and perform as required.**

#### Alternative 1 – status quo

- 1) Maintain current period for exercising the right of first refusal at 60 days from receipt of the contract.
- 2) Maintain current period for performing under the right of first refusal contract at 120 days from receipt of the contract.

#### Alternative 2: Increase an entity's time to exercise the right and perform.

- 1) Require parties to rights of first refusal contracts to extend the period for exercising the right of first refusal from 60 days from receipt of the contract to 90 days from receipt of the contract.
- 2) Require parties to rights of first refusal contracts to extend the period for performing under the contract after exercising the right from 120 days from receipt of the contract to 150 days from receipt of the contract.

### **Action 2: Increase community protections by removing or modifying the (two) ROFR lapse provisions.**

#### Provision 1

##### Alternative 1 – Status quo

Maintain current provision under which the right lapses, if IPQ are used outside the community of the entity holding the right for three consecutive years.

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<sup>11</sup> Unless otherwise specified, all references to days in this document refer to **calendar** days.

Alternative 2 – Remove provision under which ROFR lapses if IPQ are used outside the community.

Require parties to rights of first refusal contracts to remove the provision that rights lapse, if the IPQ are used outside the community for a period of three consecutive years

Provision 2

Alternative 1 – Status quo

Maintain current provision, which allows rights to lapse, if the PQS is sold in a sale subject to the right (and the entity holding the right fails to exercise the right).

Alternative 2 – Continue right of first refusal, if a community entity fails to exercise the right on a transfer of PQS.

If the right is triggered by a sale subject to the right, and a community entity chooses not to exercise the right, the right is perpetuated in the community of origin.

Alternative 3 – Allow PQS holder to identify the right holder, if a community entity fails to exercise the right on a transfer of PQS

If the right is triggered by a sale subject to the right, a new ROFR contract would be signed at the time of transfer, in which the PQS buyer names the community that gets the ROFR:

Option 1: which may be the community that chose not to exercise the right.

Option 2: which may not be the community that chose not to exercise the right.

The right holder must be an existing entity that was eligible to hold a ROFR at the time of the implementation of the program in the region in which the IPQ must be landed.

**Action 3: Apply the right to only PQS or PQS and assets in the subject community.**

Alternative 1 – status quo

The right of first refusal applies to all assets included in a sale of PQS subject to the right, with the price determined by the sale contract.

Alternative 2: Apply the right to only PQS.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS subject to the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the right applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal.

For any transaction that includes only PQS, the community entity may request that an appraiser value the PQS. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser.

The appraiser shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Timeline for appraisal and performance<sup>12</sup>

From the date of receipt of the sale contract by the community entity:

Within:

10 days: community may request an appraiser

20 days: jointly selected assessor chosen, or if the parties do not agree on a single assessor, then each party chooses an assessor

40 days: if no single assessor is chosen, the two assessors will choose a third assessor

From the date of selection of the assessor (or assessors) by either method:

Within:

60 days: the assessor(s) establish a price

120 days: notification of community entity of intent to exercise ROFR

180 days: community representative must perform under the contract

The cost of the assessor will be paid equally by the PQS holder and the community entity. If a third assessor is chosen, the PQS holder and community entity will pay their chosen assessor and divide equally the cost of the third assessor.

Alternative 3: Apply the right to only PQS and assets in the subject community.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal, or c) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal.

The appraiser will be selected by:

- 1) mutual agreement of the parties or
- 2) the PQS holder and the community representative each selecting an appraiser and by those appraisers selecting a third appraiser. This panel of appraisers will then perform the duties of the appraiser.

The appraiser shall establish a price that represents the fair market value of the PQS and community based assets, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Within 10 days of receipt of a contract that includes PQS subject to the right, the community entity may request that an appraiser identify community based assets in the transaction and establish a price for the PQS and community based assets. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser. If the community entity fails to request that an appraiser establish the price, the price in the contract will apply and the right will apply to all assets in the transaction.

For any transaction that includes assets in addition to PQS, the appraiser shall determine which assets are community based.

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<sup>12</sup> **Note that the timeline for the appraisal process is reformatted from the December 2010 motion for clarity. No substantive modifications were made.**

If an appraiser is requested by the community entity, the parties shall select the appraiser (or each shall select an appraiser) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single appraiser is not selected by agreement of the parties, the two selected appraisers shall select a third appraiser within 30 days of the community representative receiving the contract.

The appraisers shall establish the price for the PQS and community based assets within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the appraiser, within 120 days of receipt of the contract.

The cost of a mutually selected appraiser shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single appraiser, each party shall pay the costs of the appraiser it chooses, and the parties shall pay equally for the third appraiser.

**Action 4: Require community approval for IPQ subject to the right to be processed outside the subject community.**

Alternative 1 – Status quo

Intra-company transfers of PQS and IPQ outside the subject community are permitted without requiring the PQS holder to notify the community entity that holds the right.

Alternative 2 – Require community consent to move IPQ outside the community

Require the PQS holder to obtain written approval from the community entity prior to processing IPQ subject to the right (or formerly subject to the right), at a facility outside the subject community.

**Action 5: Require additional notices to right holders and NMFS**

Require the following notices from PQS holders:

- 1) To the right holder, a prior notice of all transfers of IPQ or PQS that are subject to the right (regardless of whether the PQS holder believes the right applies to the transfer) (*as a required contract provision*);
- 2) To NMFS as a part of any application to transfer PQS subject to the right to any party other than the right holder, either:
  - a. A certification of the transferor of the PQS that the right holder was provided with 90 days notice of the right and did not exercise the right during that period (in which case the PQS may transfer and the right will no longer apply); or
  - b. A certification of the new PQS holder and the right holder that a contract has been entered establishing the right with respect to the new PQS holder or that the right holder has elected to waive the right with respect to the new holder.
- 3) To NMFS, as a part of the annual application for IPQ (and copied to the right holder), a statement as to whether the right has lapsed as a result of use of the IPQ outside of the community for 3 consecutive years; and
- 4) To the right holder annually, the location of use of IPQ that are subject to a right and whether the IPQ were used by the PQS holder (*as a required contract provision*).



### **2.2.1 Alternatives considered, but not advanced for analysis**

The Council and its crab advisory committee generally considered alternative time periods to those proposed in Action 1. No additional time periods were advanced for analysis, as the suggested time period extensions, when juxtaposed with the existing time periods, are believed to present a reasonable range of time periods for consideration. Any extension beyond that proposed by this action would be excessive by presenting an unacceptable delay to completion of contracts.

The different alternatives proposed under Action 2 (and the various combinations thereof) are the only feasible alternatives available under that action.

The three alternatives (including the status quo) considered under Action 3 are the only feasible alternatives available under that action.

No alternatives to Action 4 have been considered by the Council. The Council is considering this alternative as an alternative means of protecting community interests in processing activities.

No alternatives to Action 5 have been considered by the Council, as the notices under that alternative are viewed as the reasonable alternative means of informing right holders concerning share use and transfers to protect their interests under the right of first refusal.

## **2.3 Existing Conditions**

This section describes the relevant existing conditions in the crab fisheries. The section begins with a brief description of the management of the fisheries under the rationalization program, followed by descriptions of the harvesting and processing sectors in the fisheries, including only information relevant to this action. A brief description of communities dependent on the crab fisheries is also included as background, concerning community effects of this action.

### **2.3.1 Management of the fisheries**

The following nine crab fisheries are managed under the rationalization program:

- Bristol Bay red king crab,
- Bering Sea *Chionocetes opilio*,
- Eastern Bering Sea *Chionocetes bairdi*,
- Western Bering Sea *Chionocetes bairdi*,
- Pribilof red and blue king crab,
- St. Matthew Island blue king crab,
- Western Aleutian Islands red king crab,
- Eastern Aleutian Islands golden king crab, and
- Western Aleutian Islands golden king crab.

Under the program, holders of License Limitation Program (LLP) licenses, endorsed for one or more of these fisheries, were issued owner quota shares (QS), which are long term access privileges, based on the license's qualifying harvest histories in that fishery. Catcher processor license holders were allocated catcher processor vessel owner QS for their LLPs' histories as catcher processors and catcher vessel owner QS for their LLPs' histories as catcher vessels; catcher vessel license holders were issued catcher vessel QS based on their LLPs' histories as a catcher vessel. These owner QS are approximately 97 percent of the QS pool. The remaining three percent of the initial allocation of QS was issued to eligible captains as crew QS or "C shares", based on the individual's harvest histories as a permit holder on a crab vessel. QS annually yields individual fishing quota (IFQ), which represent privileges to harvest a

particular amount of crab (in pounds) in a given season (based on the TAC). The size of each annual IFQ allocation is based on the amount of QS held in relation to the QS pool in the fishery. So, a person holding 1 percent of the QS pool would receive IFQ to harvest 1 percent of the annual total allowable catch (TAC) in the fishery. Ninety percent of the “catcher vessel owner” IFQ are issued as “A shares”, or “Class A IFQ,” which must be delivered to a processor holding an equal amount of unused individual processor quota (IPQ).<sup>13</sup> The remaining 10 percent of these annual IFQs are issued as “B shares”, or “Class B IFQ,” which may be delivered to any processor.<sup>14</sup> 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 catcher vessel owner TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.<sup>15</sup>

In addition to processor share landing requirements, Class A IFQ and IPQ (in most fisheries) are subject to regional landing requirements, under which harvests from those shares must be landed in specified regions. The following regional designations are defined for the different fisheries in the program:

Bristol Bay red king crab – North/South division at 56°20’N latitude  
Bering Sea *C. opilio* – North/South division at 56°20’N latitude  
Eastern Bering Sea *C. bairdi* – none (or undesignated)  
Western Bering Sea *C. bairdi* – none (or undesignated)  
Pribilof red and blue king crab – North/South division at 56°20’ N latitude  
St. Matthew Island blue king crab – North/South division at 56°20’N latitude  
Western Aleutian Islands red king crab – South of 56°20’N latitude  
Eastern Aleutian Islands golden king crab – South of 56°20’N latitude  
Western Aleutian Islands golden king crab – undesignated and West of 174°W longitude

To further protect community interests, the Council included in the program a provision for community rights of first refusal on certain PQS and IPQ transfers. The representative entity of any community that supported in excess of 3 percent of the qualified processing in any fishery received the right on the PQS (and derivative IPQ) arising from processing in that community.<sup>16</sup> In addition, entities representing qualified communities in the Gulf of Alaska north of 56°20’ N latitude received a right of first refusal on any PQS issued, based on processing in a community not qualifying for a right of first refusal in that same area of the Gulf. Only the community of Kodiak qualified for this Gulf provision. Four fisheries – the Eastern and Western Bering Sea *C. bairdi* and the Western Aleutian Islands red and golden king crab fisheries – are exempt from the rights of first refusal provisions, as allocations of PQS in those fisheries were based on historic processing in other fisheries.

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<sup>13</sup> C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ and regional landing requirements.

<sup>14</sup> The terms “A share” and “Class A IFQ” are used interchangeably in this paper, as are the terms “B share” and “Class B IFQ”.

<sup>15</sup> Although 90 percent of IFQ issued each year are issued as A shares, individual allocations can vary from 90 percent. Holders of PQS and their affiliates receive their IFQ allocations as A shares only to the extent of their IPQ holdings. The rationale for issuing A shares to PQS holders and their affiliates to offset IPQ holdings is that these persons do not need the extra negotiating leverage derived from B shares for these offsetting shares. To maintain 10 percent of the catcher vessel owner IFQ pool as B shares requires that unaffiliated QS holders receive more than 10 percent of their allocation as B shares (and less than 90 percent A shares).

<sup>16</sup> The community of Adak was excluded from the rights of first refusal, as that community received a direct allocation of 10 percent of the Western Aleutian Islands golden king crab fishery.

In the case of CDQ communities, the representative entity holding the right is the local CDQ group. In all other communities, the right is held by an entity designated by the community. The right is established by a contract between the community entity and the PQS holder. Under the contract, the right applies to any sale of PQS and sales of IPQ, if more than 20 percent of the PQS holder's community-based IPQ in the fishery were processed outside the community by another company in 3 of the preceding 5 years. As currently formulated, to exercise the right, the community entity must accept all terms and conditions of the underlying agreement.

Any intra-company transfers are exempt from the right of first refusal. To qualify for this exemption, the IPQ must be used by the same company.<sup>17</sup> In addition, transfers of PQS for use in their home community are exempt from the right. To meet this exemption requirement, the purchaser must agree to use at least 80 percent of the annual IPQ in the community in 2 of the following 5 years and grant a right of first refusal on the received PQS to the community's representative. Under two circumstances, the right will lapse. First, if a company uses its IPQ outside of the home community for three consecutive years, the right on the underlying PQS (and derivative IPQ) lapses. Second, if a community entity chooses not to exercise the right on the transfer of PQS, the right also lapses.

To exercise the right, a community entity must provide the seller of PQS with notice of its intent to exercise the right and earnest money in the amount of 10 percent of the contract amount or \$500,000, whichever is less, within 60 days of notice of a sale and receipt of the contract defining the sale's terms. In addition, the entity must perform under the terms of the agreement within the longer of 120 days or the time specified by the contract.

### **2.3.2 The processing sector**

Processing privileges are relatively concentrated with twenty or fewer PQS share holders in each of the fisheries subject to rights of first refusal requirements (see Table 1). Concentration of processing privileges varies across fisheries. The Eastern Aleutian Islands golden king crab fishery is the most concentrated. The Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, which have had the most participants historically, are the least concentrated. The regional distribution of shares differs with landing patterns that arose from the geographic distribution of fishing grounds and processing activities. In the St. Matthew Island blue king crab and the Pribilof red and blue king crab fisheries, most qualified processing occurred in the Pribilofs or offshore in the North region, resulting in over two-thirds of the processing allocations in those fisheries being designated for processing in the North region. The Bering Sea *C. opilio* fishery allocations are split almost evenly between the North and South regions; while less than 5 percent of the Bristol Bay red king crab PQS is designated for North processing. All qualifying processing in the Eastern Aleutian Island golden king crab fishery occurred in the South region, resulting in all processing shares in that fishery being designated for processing in the South region. The relatively low median share holdings in the large fisheries (the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries) suggest that a large portion of the historic processing was concentrated among fewer than 10 processors. In the smaller fisheries, fewer than 5 processors hold a large majority of the shares. The maximum holding in each fishery was in excess of twenty percent of the pool.

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<sup>17</sup> This provision does not apply to custom processing arrangements, as no share transfer occurs under those arrangements.

**Table 1. Processing quota share holdings as a percent of the processing quota share pool (as of June 19, 2012).**

Fishery	Share holdings by region					Across regions																																																						
	Region	PQS holders	Mean holding	Median holding	Maximum holding	PQS holders	Mean holding	Median holding	Maximum holding																																																			
	Bristol Bay red king crab	North	3	0.85	0.23	2.31	16	6.25	4.39	22.98																																																		
	South	16	6.09	4.39	20.68	Bering Sea <i>C. opilio</i>					North	8	5.87	5.51	15.46	19	5.26	3.42	25.18	South	17	3.12	0.38	9.72	Eastern Aleutian Island golden king crab	South	10	10.00	5.24	45.36	10	10.00	5.24	45.36	St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	10	10.00	6.87	32.67	South	7	3.09	2.08	7.96	Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49	South
Bering Sea <i>C. opilio</i>	North	8	5.87	5.51	15.46		19	5.26	3.42	25.18																																																		
	South	17	3.12	0.38	9.72	Eastern Aleutian Island golden king crab					South	10	10.00	5.24	45.36	10	10.00	5.24	45.36	St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	10	10.00	6.87	32.67	South	7	3.09	2.08	7.96	Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49	South	10	3.25	1.09	13.85											
Eastern Aleutian Island golden king crab	South	10	10.00	5.24	45.36	10	10.00	5.24	45.36																																																			
St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	10	10.00	6.87	32.67																																																			
	South	7	3.09	2.08	7.96					Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49	South	10	3.25	1.09	13.85																																				
Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49																																																			
	South	10	3.25	1.09	13.85																																																							

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2011-2012.  
 Note: These share holdings data are publicly available and non-confidential.

Historically, holders of PQS have operated in multiple communities (in some cases onshore and in some cases on floating processors). While any specific PQS is subject only to a single community right of first refusal, many PQS holders have different portions of their share holdings subject to rights of first refusal by different communities. **Maintaining share holdings that are subject to rights of first refusal of different communities could complicate exercise of the right, if the PQS holder attempts to include all of its share holdings in a single transaction. In this circumstance, two communities would hold a right of first refusal, yet no means of resolving a priority between the communities is established by the required contract provisions.**

**Table 2. PQS holdings subject to rights of first refusal (2011-2012).**

Fishery	Total PQS holders	PQS holders with shares subject to rights of first refusal				
		total	on behalf of one community	on behalf of two communities	on behalf of three communities	on behalf of three communities
		Bristol Bay red king crab	16	12	7	5
Bering Sea <i>C. opilio</i>	19	15	11	3	1	0
Eastern Aleutian Islands golden king crab	10	9	9	0	0	0
Pribilof red and blue king crab	13	11	8	3	0	0
Saint Matthew Island blue king crab	10	8	6	2	0	0
All fisheries	27	22	17	2	2	1

Source: RAM permit database (2011-2012)

Under the rationalization program, a large portion of the processing (and raw crab purchasing) is vested in the holders of processing shares. These share holders have used their allocations to consolidate processing activities in the fisheries, with plant participation in each fishery dropping by approximately one-third. Since the rationalization program was implemented, the number of processing plants participating in the Bristol Bay red king crab fisheries has remained relatively constant at approximately 12. The average processing by the top 3 plants in the fishery increased to approximately 20 percent, with the concentration of the different share types slightly higher (suggesting that the largest processors of the different share types differ). In the first six years of the program, between 10 and 12 plants have participated in the Bering Sea *C. opilio* fishery, a decline of almost 5 plants from prior to the program. Concentration of processing declined slightly in the 2010-2011 season. This decline likely resulted from the increase in the TAC, which resulted in substantial increases in the mean and median pounds processed, as well as the average pounds processed by the largest three plants. Ten or fewer plants participated in processing in the

Bering Sea *C. bairdi* fisheries in the first three years of the program. Since these fisheries are directly prosecuted by few vessels and have relatively small TACs, the processing is slightly more concentrated than in the two largest fisheries. Five or fewer plants participated in the Eastern Aleutian Island golden king crab and Western Aleutian Island golden king crab fisheries in the first three years of the program, limiting the information that may be released concerning processing in those fisheries.

In the first two years of the program, a large portion of the IPQ pool was subject to the “cooling off” provision, which required most processing to occur in the community of the processing history that led to the allocation of the underlying PQS. Consequently, few changes in the distribution of processing of Class A IFQ/IPQ landings occurred in the first two years of the program. Also, for most shares, entities representing the community of origin hold a right of first refusal on the transfer of the PQS and IPQ for use outside the community. This right is relatively weak, because intra-company transfers are exempt from the right, and, under the status quo, the right lapses if the IPQ are used outside of the community of origin for a period of three consecutive years. Despite the end of the cooling off period and the ease with which the right of first refusal may be avoided, in the third year of the program, most processing of IPQ landings occurred in the community of origin. Discerning the degree of redistribution, however, is not fully possible, as landings on floating processors are often categorized as “at-sea”. In many cases, these floaters operated within community boundaries, at times docked in the community harbor. In the 2010-2011 season, four years from the lapse of the ‘cooling off’ provision requirements, some redistribution of processing of Class A IFQ landings is suggested (see Table 3). Dutch Harbor and Akutan, collectively, have attracted slightly more Class A IFQ landings in the Bristol Bay red king crab fishery than under the cooling off period. These redirected landings reduced landings in King Cove and Kodiak, collectively. In the cooling off period, King Cove and Kodiak received substantially larger percentages of Class A IFQ landings than their rights of first refusals suggest. These likely occurred as landings from within borough boundaries were consolidated in King Cove and as King Cove and Kodiak attracted landings that were unconstrained by the cooling off requirements. Processing of A share IFQ in Akutan and Dutch Harbor in the Bering Sea *C. opilio* fishery dropped substantially (by almost 20 percent) in the fifth and sixth years of the program. Redistribution of these landings to other locations cannot be revealed, because of confidentiality restrictions. The movements of landings suggest that with the cooling off provision expiring, it is possible to see a significant redistribution of landings among communities.

**Table 3 Processing by share type and community (2010-2011)**

2010-2011										
Fishery	Community	Class A IFQ			Class B IFQ			C share IFQ		
		Number of active plants	Pounds of share type processed	Percent of issued shares processed	Number of active plants	Pounds of share type processed	Percent of landings of share type	Number of active plants	Pounds of share type processed	Percent of landings of share type
Bristol Bay red king crab	Akutan	1	7,347,018	65.8	1	980,682	79.3	1	298,500	77.6
	Dutch Harbor	3			3					
	Floater	1	*	*	2	*	*	2	*	*
	King Cove	1	2,408,423	21.6	1	146,117	11.8	1	*	*
	Kodiak	2			4			1		
	St. Paul	1			1			1		
Bering Sea <i>C. opilio</i>	Akutan	1	14,590,830	37.6	1	2,556,937	60.1	1	890,684	65.0
	Dutch Harbor	3			4					
	Floater	2	*	*	2	*	*	2	*	*
	King Cove	1	*	*	1	*	*	1	*	*
	Kodiak	1	*	*	1	*	*	2	*	*
	St. Paul	1	*	*	1	*	*	1	*	*
E. Aleutian Islands golden king crab	Dutch Harbor	3	*	*	3	261,706	100.0	3	84,933	100.0
	Floater	1	*	*	0	0	0.0	0	0	0.0
W. Aleutian Islands golden king crab	Dutch Harbor	4	1,184,177	98.8	3	132,427	100.0	2	*	*
St. Matthew Island blue king crab	Dutch Harbor	3	*	*	2	*	*	3	*	*
	St. Paul	1	*	*	1	*	*	1	*	*

Source: RAM IFQ data and RCR permit file.  
 \* withheld for confidentiality.  
 Note: For Class A IFQ shows percentage of IPQ pool.

Processing share holders have achieved efficiencies under the program through consolidation of processing activities in fewer plants. A portion of this consolidation has been through traditional transfer of PQS and IPQ; but a substantial portion has also occurred through custom processing arrangements. Under these arrangements, a share holder contracts for the receipt and processing of landings of crab, while retaining all interests and obligations associated with the landed and processed crab.

The prevalence of custom processing relationships is evident in comparing the number of active IPQ accounts with the number of active processing plants (see Table 4). In the first year of the program, custom processing of deliveries occurred most prominently in the Bering Sea *C. opilio* fishery. Custom processing arrangements in that fishery expanded in the second year of the program and appear to have declined since. The decline may have occurred as relationships between plants and share holders stabilized, with fewer share holders having relationships with more than one plant. Few custom processing arrangements existed in the Bristol Bay red king crab fishery until the third year of the program, when Dutch Harbor plants entered relationships with several buyers. Few custom processing arrangements exist in other fisheries; however, it is possible that extensive custom processing may have occurred under any of those fisheries. Confidentiality protections prevent revealing processing amounts subject to these arrangements because of the relatively few processing participants in the fisheries.

**Table 4 Number of active IPQ holder (buyer) accounts and IPQ processing plants by fishery (2005-2006 though 2010-11).**

Fishery	Region	Community of Plant	2005 - 2006		2006 - 2007		2007 - 2008		2008 - 2009		2009 - 2010		2010 - 2011	
			Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants
Bristol Bay red king crab	North	St. Paul	1	1	1	1	2	1	1	1	2	1	2	1
		Akutan	1	1	1	1	2	1	1	1	2	1	2	1
	South	Dutch Harbor	3	3	3	3	7	4	7	4	4	3	4	3
		King Cove	1	1	3	1	1	1	1	1	2	1	2	1
		Kodiak	2	2	2	2	2	2	2	2	2	2	2	1
		Floater	2	2	2	2	2	1	2	1	1	1	1	1
Bering Sea <i>C. opilio</i>	North	St. Paul	1	1	1	1	5	1	5	1	5	1	5	1
		Floater	6	3	14	2	3	1	2	1	2	1	2	1
	South	Akutan	1	1	1	1	1	1	1	1	1	1	1	1
		Dutch Harbor	5	4	7	3	4	3	3	4	3	4	3	
		King Cove	1	1	1	1	1	1	1	1	1	1	1	1
		Kodiak	1	1	1	1	1	1	1	1	1	1	1	1
		Floater	1	1	1	1	3	1	2	1	2	1	1	1
E. Aleutian Islands golden king crab	South	Akutan			1	1			1	1				
		Dutch Harbor	3	3	4	4	4	4	4	4	6	3	6	3
		Floater	1	1									1	1
W. Aleutian Islands golden king crab	Undesignated	Adak	1	1										
		Dutch Harbor	2	2	2	2	2	2	4	3	4	2	4	2
		Floater							1	1				
	West	Adak	2	1	2	1	1	1	2	1				
		Dutch Harbor*									2	1	3	2
		Floater	3	2										
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	Akutan			1	1	1	1	1	1	2	1		
		Dutch Harbor			5	3	4	3	3	3	5	3		
		King Cove			1	1	1	1	1	1	2	1		
		Floater			1	1	2	2	4	2	2	1		
Western Bering Sea <i>C. bairdi</i>	Undesignated	Akutan	1	1	1	1								
		Dutch Harbor	4	4	5	3	3	2	3	3				
		King Cove	1	1	1	1	1	1	1	1				
		Kodiak	1	1										
		St. Paul	1	1			3	1						
		Floater	4	2	1	1	3	2	3	2				
St. Matthew Island blue king crab	North	St. Paul			Fishery closed						5	1	6	1
	South	Akutan			Fishery closed								1	1
		Dutch Harbor			Fishery closed						1	1	3	3

Source: RAM IPQ data and RCR permit file.

\* Processed under the exemption from regional delivery requirements.

### 2.3.3 Right of first refusal administration

Rights of first refusal are administered under the program through contractual requirements of affected parties. First, recipients of an initial allocation of PQS to which a right of first refusal could be applied must have entered a contract with an identified community representative prior to receiving that allocation. In addition, recipients of a transfer of PQS subject to the right but that does not trigger the

right must enter a right of first refusal contract for that PQS prior to the transfer being processed. Once contracts are entered, the holder of the right and the PQS holder oversee the right through civil actions. This approach is intended to ensure that the right is established as required, while limiting the extent of agency involvement in any private dispute between the parties to the contract.

#### **2.3.4 Right of first refusal**

Based on the qualifying criteria, 8 communities were eligible to have representative entities receive rights of first refusal in the different fisheries governed by the program (see Table 5).<sup>18</sup> The distribution of rights differs across fisheries, with Akutan, Unalaska, King Cove, St. Paul, and St. George all starting the program with rights on approximately 10 percent or more of the PQS in at least one fishery. Tracking the existence of rights is complicated, as current reporting requirements provide insufficient information for NMFS to actively monitor rights. Only if the lapse of rights is voluntarily reported to NMFS will those lapses be recorded in NMFS data. So, it is possible that rights have lapsed, in addition to those shown.

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<sup>18</sup> Rights established on implementation are included, as even those which have lapsed could be resurrected under one of the alternatives.

**Table 5. Distribution of rights of first refusal by community on implementation and at the end of the 2011-2012 season (June 2012).**

Fishery	Region	Right of First Refusal Beneficiary	Percentage of PQS pool	
			on Initial Allocation	In the 2011-2012 season
Bristol Bay red king crab	North	None	0.0	0.0
		St. Paul	2.5	2.5
	South	Akutan	19.7	19.7
		False Pass	3.7	3.7
		King Cove	12.7	7.4
		Kodiak	3.8	0.2
		None	3.4	12.2
		Port Moller	3.5	3.5
Unalaska	50.7	50.7		
Bering Sea <i>C. opilio</i>	North	None	1.0	16.0
		St. George	9.7	0.0
		St. Paul	36.3	30.9
	South	Akutan	9.7	9.7
		King Cove	6.3	6.3
		Kodiak	0.1	0.0
		None	1.8	2.0
		Unalaska	35.0	35.0
Eastern Aleutian Islands golden king crab	South	Akutan	1.0	1.0
		None	0.9	7.8
		Unalaska	98.1	91.2
Pribilof red and blue king crab	North	None	0.3	2.7
		St. George	2.5	0.0
		St. Paul	64.8	64.8
	South	Akutan	1.2	1.2
		King Cove	3.8	3.8
		Kodiak	2.9	2.9
		Unalaska	24.6	24.6
Saint Matthew Island blue king crab	North	None	64.6	64.6
		St. Paul	13.8	13.8
	South	Akutan	2.7	2.7
		King Cove	1.3	1.3
		Kodiak	0.0	0.0
		Unalaska	17.6	17.6

Source: RAMPQS data 2011-2012

In six instances, community entities holding the right have acquired PQS subject to the right (see Table 6). A variety of arrangements led to these transactions, but in no case was the right exercised directly. In one fishery, a portion of the PQS subject to the right was transferred to the community entity holding the right, while the right with respect to another portion of the PQS was allowed to lapse. In another instance, a PQS holder with a considerable harvest share holding transferred its PQS to the right holding community entity to avoid a potential harvester/processor affiliation that would have prevented participation in the arbitration program. In most cases, right holding community entities have been actively involved in PQS transactions involving shares subject to their rights. In some cases, those entities have acquired shares; in others, they have allowed transactions to proceed. This community involvement



in transactions suggests that the right has affected community interests. In two cases, a right holder has voluntarily agreed to relinquish the right. The terms of those agreements (and whether any compensation was made for the relinquishment) are not known.

Circumstances in the various communities and of the right holders and the processors have affected the manner in which PQS have either been transferred to right holders or have been relinquished. The limitations of the ‘cooling off’ provision prevented much of the IPQ subject to the right of first refusal from being used outside the community of origin in the first two years of the program. Only in the third year of the program (once the cooling off limitation lapsed) was any sizeable portion of the IPQ permitted to be moved. As a result, rights of first refusal on PQS are believed to have lapsed (as a result of use outside the community) in only a few instances in the first three years of the program. Most notably, the right has lapsed with respect to PQS arising from historic processing in St. George. The St. George harbor and its entrance were damaged by a storm in 2004. In the first two years of the program, NOAA Fisheries found that damage prevented processing in St. George, and on request of both the community of St. George and APICDA, approved use of a regulatory exemption to the cooling off landing requirements. In the third year, the PQS holders used the IPQ outside the community. As a consequence, by its terms, the right of first refusal lapsed on shares for which the Aleutian Pribilof Island Community Development Association (APICDA) held rights of first refusal on behalf of St. George. Despite these circumstances, APICDA reached agreements with both PQS holders with respect to these shares. Under the agreement with one of the PQS holders, APICDA acquired the PQS formerly subject to the right. The terms of the other agreement are not known, but APICDA relinquished its right as a part of that agreement.

In addition to shares subject to the St. George right of first refusal, PQS allocated based on processing in the Aleutians East Borough communities (i.e., Akutan, False Pass, King Cove, and Port Moller) was permitted to be moved within the borough (and outside the community) during the cooling off period. As a consequence, rights of first refusal for the benefit of those communities may also have lapsed from movement of processing.

**Table 6. PQS no longer subject to rights of first refusal by fishery.**

Fishery	Community formerly benefiting from the right	Percentage of PQS pool no longer subject to the right	Percentage held by right holder
Bristol Bay red king crab	King Cove	5.3	5.3
	Kodiak	3.5	3.5
Bering Sea <i>C. opilio</i>	St. George*	9.7	5.7
	St. Paul	5.4	5.4
	Kodiak	0.1	0.1
Eastern Aleutian Islands golden king crab	Unalaska*	6.9	0.0
Pribilof red and blue king crab	St. George	2.5	2.5
St. Matthew Island blue king crab	Kodiak**	0.0	0.0
Source: RAMPQS data (2011-2012)			
* All shares not acquired by the right holder were released from the right by the right holder.			
**Right holder acquired small number of shares (less than 0.1 percent of the PQS pool).			
Note: The table omits PQS amounting to 0.5 percent of the PQS pool in the Bristol bay red king crab fishery that are not currently subject to a right. The representative of Port Moller held that right at the start of the program. The removal of the right has not been reported to NMFS.			

Assessing the extent to which rights have lapsed beyond those voluntarily reported to NOAA Fisheries is difficult because of the nature of available landings data. While some PQS holders have reported lapsing of rights voluntarily, regulations do not require PQS holders to report lapsing of a right. Although geographic landing requirements are applied in the program, records concerning location of landings are limited by record keeping protocols. Prior to the 2009-2010 season, most deliveries to floating processors were recorded as processed ‘at sea,’ without designation of a port. These ‘at sea’ deliveries may have taken place within community boundaries, and therefore may not be considered as being outside of the community that benefits from the right of first refusal. On the other hand, landing records will not fully reflect the geographic distribution of landings, which may result in rights lapsing (because of use of IPQ outside of the community for three consecutive years). In addition, no formal system is in place for reporting and documenting the lapse of rights of first refusal. Given this shortcoming, it is possible that more community rights of first refusal may have lapsed than are reflected in the available data. To address that shortcoming, NOAA Fisheries revised reporting requirements to collect processing by community from stationary floating shore plants, needed to determine whether landings on floating processors occur within community boundaries. This change, which became applicable in the 2009-2010 season, will allow monitoring of future lapses of rights of first refusal arising from use of the yielded IPQ outside of the designated community.

### 2.3.5 Communities

Eight communities have historically received substantial landings from the Bering Sea and Aleutian Islands crab fisheries in which the rights of first refusal apply: Unalaska, Akutan, King Cove, St. Paul, St. George, Kodiak, Port Moller, and False Pass. These communities vary in their geographic relation to the fishery; their historical relationship to the fishery; and the nature of their contemporary engagement with the fisheries through local harvesting, processing, and support sector activity or ownership. Each of these factors influences the direction and magnitude of potential social impacts associated with the proposed action (NPFMC, 2008).

Commercial fishing and seafood processing play a significant role in the economic success of Unalaska/Dutch Harbor. This community is home to the greatest concentration of processing and catcher vessel activity of any Alaska community. In recent years, pollock has accounted for the majority of the total wholesale value processed in Dutch Harbor. The second largest contributor to total wholesale value processed in Dutch Harbor has been crab, with red king crab providing the largest value contribution of a crab species, followed by *C. opilio*. Dutch Harbor based processors received a substantial share of the PQS allocations in most crab fisheries under the rationalization program. These shares are subject to rights of first refusal of the Dutch Harbor community entity. These shares are unlikely to migrate out of the community, because crab processing at most facilities plays an important part in an integrated operation that serves several fisheries. Under the right of first of refusal, Unalaska/Dutch Harbor is represented by Unalaska Crab, Inc., a community entity created explicitly for the purpose of holding rights of first refusal and crab shares under the program. The City Council is the board of directors for this company (see NPFMC/AECOM, 2010; NPFMC/EDAW, 2008).

Once heavily dependent upon salmon, the community of King Cove is now more diversified, processing groundfish and crab from the GOA and BSAI. The community is home to several large crab vessels, and is also home to Peter Pan Seafoods,<sup>19</sup> the only shore based processor located in King Cove. The plant processes salmon, crab, halibut, and groundfish. A large majority of King Cove’s work force is employed full time in the commercial fishing industry, with additional employment in the community in support

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<sup>19</sup> Peter Pan Seafoods is a wholly owned subsidiary of Nichiro-Maruha Corp., which also owns Westward Seafood operations in Dutch Harbor and a portion of Alyeska Seafoods.

businesses dependent on commercial fishing. For several years now, the amount and total value of crab processed in King Cove have been declining, while groundfish processing has increased. The decline in crab production was due primarily to a decline in quotas, related to reduced stocks. In addition, AFA sideboard limits on BSAI crab have also limited the amount of crab that could be processed in King Cove. Under the rationalization program, crab processing has remained an important component of the diversified processing undertaken at the shore plant in King Cove. Yet, the potential for the community to attract additional processing is limited by excessive share caps, which constrain the local plant since its parent merged with the owner of two other plants active in the crab fisheries. In addition, rapid fleet contraction under the program, particularly in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, has affected King Cove. Approximately 20 crew jobs were estimated to have been lost (see Lowe, et al., 2006). Although difficult to quantify because of the yearly variation in crew employment, the estimate is consistent with information gathered in other studies (see NPFMC/AECOM, 2010). In the first year of the program, fleet contraction is also believed to have caused a drop in demand for harbor and moorage services, and goods and services from fishery support businesses in King Cove. Attribution of these effects to the change in crab management is difficult, since data isolating spending of crab vessels and fishery participants from spending associated with other fishery and non-fishery activities, are not available (see Lowe, et al., 2006). Subsequently, King Cove businesses are believed to have received increased demand for services, comparable to pre-rationalization levels, as vessels continuing to participate in the crab fishery are believed to have spent more time in the area during the longer seasons (NPFMC/EDAW, 2008). Aleutia, Inc. is the community entity representing King Cove. Originally established as a salmon marketing company, the company also represents Sand Point and King Cove as their halibut and sablefish Community Quota Entity for purchases of quota in those fisheries.

The economy of Akutan is heavily dependent upon the groundfish and crab fisheries in the BSAI and GOA. The community is home to one of the largest shore based seafood processing plants in the area and is also home to a floating processor. The community also provides some limited support services to the fishing community. In addition, Akutan is a Community Development Quota (CDQ) community. The vast majority of catch landed in Akutan comes from vessels based outside of the community. Most of those vessels focus primarily on pollock, Pacific cod, and crab. The large shore plant is operated by Trident Seafoods. The shore processor is a multi-species plant, processing primarily pollock, Pacific cod, and crab. Given that the plant is an AFA-qualified plant with its own pollock co-op, pollock is the primary species in terms of labor requirements and economic value. However, the shore plant also accounts for a significant amount of the regional crab processing (in both value and volume) (EDAW, 2010). As with plants in Dutch Harbor and King Cove, crab has remained an important part of a diverse operation at the shore plant in Akutan, since implementation of the rationalization program. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of Akutan.

Although the economy of Kodiak is more diversified compared to King Cove and Akutan, fishing is a significant contributor to the community economy. Excluding the USCG, four of the top ten employers in Kodiak in 2003 were fish processors. Kodiak's processing sector has also relied on a diverse group of fisheries to support its operations through ebbs and flows in resource availability. Although Kodiak has a long history of crab processing, in the years leading up to the implementation of the rationalization program (including the qualifying years used for processor share allocation), its dependence on the Bering Sea and Aleutian Island crab fisheries was small relative to Unalaska, King Cove, Akutan, and St. Paul. A study of the effects of the rationalization program on Kodiak during the program's first year found anecdotal evidence suggesting declines in spending at some businesses, but evidence of a broad decline in total local spending could not be identified. The study cautioned that effects may lag, so these findings should be viewed as preliminary (Knapp, 2006). The City of Kodiak and the Borough of Kodiak are

represented by Kodiak Fisheries Development Association, an entity formed for the sole purpose of holding rights of first refusal and crab quota on behalf of the city and borough.

Unlike King Cove, Akutan, Unalaska, or Kodiak, St. Paul is primarily dependent upon the processing of snow crab, harvested in the North Pacific. According to ownership data, all crab deliveries to the Pribilof Islands are made by non-resident vessels. Since 1992, the local shoreplant on St. Paul has been the primary processor for crab in the North region. St. Paul is a primary beneficiary of the North/South regional distribution of shares in the rationalization program. This limitation on landings should ensure that a substantial portion of the processing in the Bering Sea *C. opilio* fishery is undertaken in St. Paul. In the long run, it is possible that St. George could obtain a greater share of North landings, but most participants currently prefer St. Paul's harbor facilities to those available in St. George. Central Bering Sea Fishermen's Association, the St. Paul CDQ group, is the community entity holding rights of first refusal on behalf of St. Paul.

As with St. Paul, St. George has depended primarily on processing of crab from the Bering Sea *C. opilio* fishery. Processing of crab in St. George has been exclusively by floating processors. Since 2000, little or no crab processing has taken place in St. George. Prior to the rationalization program, the loss of processing activity was primarily attributable to the decline in crab stocks. Under the rationalization program, no processing has returned to St. George. Processing shares were subject to the 'cooling off' provision requiring the processing of landings with those shares to be undertaken in St. George. Yet, harbor breakwater damage caused by a storm prevented deliveries to the community during the first two years of the program and that activity has not returned. Whether the community can attract crab landings in the future depends, in large part, on its ability to provide processing capacity and a harbor that is perceived to be safe and suitable for the large vessels currently used in the fisheries. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of St. George.

Limited processing of catch from the Bristol Bay red king crab fishery on floating processors occurred in the communities of False Pass and Port Moller in the processor qualifying years. This processing qualified both communities for rights of first refusal under the program. No processing is believed to have occurred in either community since implementation of the program. And, neither community currently has a shore-based processing plant that supports crab processing. Port Moller has a salmon plant that is operated seasonally. Aleutian Pribilof Island Community Development Association, the local CDQ group in False Pass, is in the process of opening a processing plant in that community. At this stage, the plant does not support crab processing. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of False Pass. The right of first refusal for Port Moller is held by Aleutia.<sup>20</sup>

### **2.3.6 Deliveries in the fisheries**

Under the rationalization program, season limits are imposed for biological reasons. With this new latitude to schedule harvest activity, participants have dispersed catch substantially across the seasons (see

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<sup>20</sup> Detailed descriptions of these communities and their historical and recent dependence on crab fisheries (including crab processing and the rights of first refusal) are contained in EDAW (2005), North Pacific Fishery Management Council/AECOM (November 2010), North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004a), and North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004b) Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries, and EDAW (2004).

Table 7).<sup>21</sup> For example, the 2005-2006 Bristol Bay red king crab season was prosecuted towards the 18.3 million pound TAC over the 3-month period following the October 15, 2005 season opening date; the first delivery was made on October 20, 2005 and the last delivery was made on the day after the regulatory closure date of January 15, 2006. In all of the fisheries, deliveries have been distributed over a period of several months; however, deliveries remain most concentrated in the Bristol Bay red king crab fishery. That season is only four months, substantially shorter than the season in other fisheries, and markets tend to be strongest at the year's end leading up to the holidays. These extended seasons provide flexibility to schedule deliveries to accommodate market and operational preferences, as well as address unforeseen contingencies.

**Table 7. Post-rationalization pattern of catcher vessel deliveries by fishery.**

Fishery	Season	Season opening	Date of first delivery	Week of most deliveries (in pounds)		Date of last delivery	Season closing
				Weekending date	Percent of quota delivered		
Bristol Bay red king crab	2005-2006	October 15	October 20	November 5	28.6	January 16	January 15
	2006-2007		October 19	November 5	44.0	November 28	
	2007-2008		October 18	November 5	31.1	January 15	
	2008-2009		October 18	November 5	28.7	January 17	
	2009-2010		October 17	November 5	41.0	January 16	
	2010-2011		October 16	October 29	31.5	December 10	
Bering Sea <i>C. opilio</i>	2005-2006	October 15	October 27	February 4	11.0	May 27	May 15 (east) May 31 (west)*
	2006-2007		November 7	February 25	11.1	May 5	
	2007-2008		November 18	February 25	13.0	May 10	
	2008-2009		November 30	February 11	10.7	May 16	
	2009-2010		October 25	March 4	15.5	May 6	
	2010-2011		November 18	February 11	15.3	April 9	
Eastern Aleutian Islands golden king crab	2005-2006	August 15	August 30	September 19	14.1	March 28	May 15
	2006-2007		August 31	**	**	January 13	
	2007-2008		August 30	**	**	February 9	
	2008-2009		September 7	October 3	14.8	December 22	
	2009-2010		August 31	September 12	17.1	January 10	
	2010-2011		August 22	October 17	18.6	December 16	
Eastern Bering Sea <i>C. bairdi</i>	2006-2007	October 15	October 23	March 11	18.1	March 27	March 31
	2007-2008		October 20	March 24	7.0	April 2	
	2008-2009		October 19	**	**	March 11	
	2009-2010		October 17	November 19	22.7	March 1	
Western Aleutian Islands golden king crab	2005-2006	August 15	September 6	October 24	11.4	March 25	May 15
	2006-2007		September 10	**	**	May 6	
	2007-2008		September 14	**	**	May 21	
	2008-2009		September 13	**	**	May 12	
	2009-2010		September 5	**	**	May 18	
	2009-2010		September 11	**	**	March 18	
Western Bering Sea <i>C. bairdi</i>	2005-2006	October 15	October 27	March 25	7.9	May 3	March 31
	2006-2007		November 4	March 11	16.3	April 5	
	2007-2008		November 16	March 3	5.5	March 31	
	2008-2009		January 11	March 11	4.0	April 6	
St. Matthew Island blue king crab	2009-2010	October 15	October 23	November 19	14.4	December 7	February 1
	2009-2010		October 23	December 3	18.4	December 11	

Source: RAMIFQ landings data

\* The boundary between the Eastern and Western Subdistricts is 173° W longitude.

\*\* withheld for confidentiality.

To date, two conditions may have created impediments to deliveries in specific communities (or locations), ice conditions and a fire aboard a floating processor.<sup>22</sup> Ice conditions have been an obstacle to deliveries from the Bering Sea *C. opilio* fishery in to the Pribilof communities every year since implementation of the program. When ice is an obstacle to deliveries, it also often limits access to fishing

<sup>21</sup> The following tables concerning deliveries include only catcher vessel activity.

<sup>22</sup> Although the absence of processing in St. George caused deliveries to be redirected to St. Paul, that redistribution is permitted without exemption to the regional landing requirements. In addition, the circumstances that prevented deliveries into Adak prompting emergency rulemaking and provision for exemption from regional landing requirements in that fishery are beyond the scope of this action.

grounds, further complicating harvests and deliveries in the fishery. In each of the first seven years of the program, ice has abutted St. Paul, the only community in the North region to receive landings under the program. In addition, ice has abutted St. George, whose representative holds rights of first refusal on PQS, in more than half of the years. Depending on the severity of conditions, this ice may prevent deliveries of catch into those communities. Harvesters with catch on board prevented from making a delivery in a particular location by ice could elect to make the delivery to a processor in a location unaffected by the ice (provided it remains in the designated region). Whether ice prevents a delivery to a specific location may depend on the circumstances, including the spatial distribution and type of ice, the specific vessel, the location of the vessel relative to the delivery location, the amount and condition of crab on board, and any factors affecting the willingness of the captain to wait for conditions to change. While the fleet has coordinated harvests of the North region IFQ, fishing that allocation early in the season before ice conditions reached their extreme. That coordination, however, is not likely to adequately address all circumstances.

The most severe delivery problems in the fishery occurred in this year 2012, when ice surrounded St. Paul Island and covered much of the fishing grounds for several weeks. Alaska Department of Fish and Game extended the season in the fishery for 15 additional days to allow for full harvest of IFQ.<sup>23</sup> Landings in the fishery extended through the end of the season. In the spring of 2007, icing problems in the North region were compounded by a disabling fire on one of the two floating processors scheduled to operate in the North region. With limited processing capacity scheduled for the North region, deliveries were delayed, and, at one point, three crab vessels were trapped in the ice temporarily outside St. Paul harbor. Travelling through ice no doubt poses threats to fishing vessels and crews. Vessels are not only at greater risk of loss, but also may suffer hull, propeller, and rudder damage. In some instances, this damage may not be easily detectable. Through the first five years of the program, several vessel owners have said that they believe their vessels suffered extraordinary wear and tear from traversing through ice to make North region deliveries. The extent to which the North region landing requirement has contributed to these safety risks is uncertain. Prior to implementation of the rationalization program, vessels periodically became trapped in the ice during the Bering Sea *C. opilio* season, particularly when attempting deliveries to St. Paul. In addition, most harvesters prefer to deliver catch in the Bering Sea *C. opilio* fishery to the Pribilofs to avoid the travel costs associated with deliveries to the South. Lastly, ice conditions that cause problems for deliveries to the Pribilofs are frequently accompanied by icing problems on the grounds. To the extent that harvesters are unable to make deliveries to St. Paul for an extended period, they may be unable to continue fishing. Harvesters unable to fish, however, may need to offload any crab onboard to avoid excessive deadloss.

Whether deliveries to a community are prevented in the future by conditions other than ice will depend on several factors, including the availability (or replaceability) of processing capacity in the community. In communities with several shore-based platforms (such as Kodiak and Unalaska), a PQS holder is likely to have several delivery alternatives should a facility be disabled. In such a case, communities with a single platform (such as Akutan or King Cove) may provide little opportunity to have crab processed in the community should a plant be disabled.

In December 2010, to address potential circumstances that could prevent deliveries in a region, the Council adopted an amendment that would create an exemption to the regional landing requirements. Generally, the exemption would only be permitted on agreement of the IFQ holder, IPQ holder, and

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<sup>23</sup> ADFG, Emergency Order 4-S-24-12, Bering Sea Snow Crab Fishery Partial Extension of Eastern Subdistrict (May 8, 2012) and ADFG, Emergency Order No. 4-S-25-12, Bering Sea Snow Crab Season Extended (May 14, 2012).

community entity holding the right of first refusal. These parties are intended to specify both mitigating actions and possible compensation, in the event the exemption is granted. The exemption is intended to be administered by the parties through two agreements. A framework agreement (required to be entered by October 15<sup>th</sup> each season) would be used to outline the terms of the exemption. An exemption agreement would be intended to define the terms of the specific exemption. The amendment is likely to be implemented for the 2013-2014.

## **2.4 Analysis of alternatives**

This amendment package considers five changes to the current right of first refusal intended to make the right more effective for protecting community interests. To simplify the analysis, each action is analyzed independently, with interactive effects discussed after those analyses.

### **2.4.1 Action 1 – Action to modify period to exercise right and perform under the contract**

#### **Alternative 1 – status quo – maintain 60-day period to exercise right and 120-day period for performance.**

Under the current right of first refusal contract requirements, a community entity has 60 days from receipt of a contract defining a transfer from a PQS holder to exercise the right of first refusal. Within that time period, the community entity must inform the PQS holder that it is exercising its right and provide earnest money of 10 percent of the transaction amount or \$500,000, whichever is less. The 60 day period in which to exercise the right is intended to provide community entities with the opportunity to assess the merits of intervening in the transaction. For some entities, such as CDQ groups, decisions of whether to enter simple, low value, transactions may be made expeditiously; however, larger more complex transactions could involve a more extended decision making process for a community entity.

For any transaction, the community entity must assess the value of the various items included in the transaction. PQS alone could be very costly.<sup>24</sup> In addition, under the current provision, other items included in the transaction would be subject to the right, which could drive up the transaction price substantially. Depending on its plans for use of the PQS and assets acquired in the transaction, a community entity may need to assess the value of each of these items independently or as groups of items, along with their value as part of the transaction, as a whole. To make these determinations, an entity may need to consult experts or conduct its own appraisals. In addition to the other steps involved in the decision making process, the entity may need to arrange financing. Depending on the purchase, financing arrangements may require substantial due diligence on the part of any financing party. Independent assessments of the transaction, including valuations of possible collateral may be necessary. In some instances the entity may undertake a public meeting process or take formal board action to make a purchase. Notice requirements may be applied to any such meetings. Each of these various steps in the decision making process requires time.

Community entities may also need to undertake considerations beyond those confronted by entities acting as simple business entities. For example, an entity may only wish to exercise the right, if it is confident that the assets will bring some type or level of benefit to the community. Achieving these benefits may depend on relationships with other community-based operations and commitments of residents. These relationships and arrangements may be complex, and commitments may take time to attain.

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<sup>24</sup> Since few transactions for PQS have taken place in the first few years of the program, price data cannot be released.

In addition to having a limited period of time to exercise a right, community entities also have a limited period of time in which to perform under the right of first refusal. Under the current rule, an entity exercising its right has 120 days from receipt of the contract to fully perform under the contract. This added time for performance is intended to provide the entity with adequate time to finalize financing arrangements, including all necessary due diligence by lenders. This extended period may also allow for the entity to make additional arrangements, such as partnerships for use of assets or transactions for portions of the assets that it may not wish to maintain.

The current time periods for exercise and performance of a right of first refusal may be adequate for a community entity that has an opportunity to enter a relatively straightforward transaction for a small amount of PQS; however, these time periods may pose a great challenge for a community entity that faces an opportunity to enter a complex and costly transaction. The complexities of both determining whether it is appropriate to enter a transaction, as well as arranging financing, may prove insurmountable for a community entity that has 60 days in which to make a determination of whether to enter a transaction, and then have only an additional 60 days (or 120 days from notice) to perform.

To date, the existing timelines are not reported to have prevented any community exercise of a right of first refusal; however, the absence of the timeline constraining participants should not be interpreted as suggesting that the timeline provides communities adequate time for decision making and performance. The absence of a constraint has occurred largely because PQS holders have worked with community entities when transferring PQS, rather than risking the exercise of the right by an entity. In effect, the timeline has not applied, as PQS holders have avoided triggering the right. Some community entities, however, have suggested that, based on their experiences attempting to determine whether to pursue a transaction for PQS and arrange financing for the transaction, the existing timeline for exercising the right and performing under the contract may be inadequate, particularly for large transactions.

Since the time periods have not been relevant to PQS sales to date, they have not directly affected PQS holders. The requirement of waiting 60 days to finalize a sale could affect a PQS holder that chooses to trigger the right, particularly, if timing of the transaction is important. In most cases, it may be expected that PQS holders will avoid triggering the right to prevent a transaction from being interfered with by the exercise of the right. This can be accomplished either by including the right holder in the transaction, or by agreeing to use 80 percent of the yielded IPQ in the community for 2 of the following 5 years. This approach by the PQS holder can also prevent possible delays in the transaction that could arise from the provision allowing the right holder 120 days from notice of the transaction to perform under the contract. Given the avenues available to a PQS holder to avoid triggering the right, the current timeline for exercise of the right and performance of the contract should pose little problem for a PQS holder wishing to transfer shares. Only in a situation where a PQS holder feels compelled to transfer shares quickly, and is negotiating with a buyer that refuses to use the yielded IPQ in the community are the time periods defined in the right of first refusal likely to be problematic for a PQS holder.

In general, the status quo time periods provide right holders with efficient decision making processes and existing financial arrangements with a reasonable opportunity to exercise and perform on a right of first refusal; however, entities that have a more public, time consuming decision making process or without well-established credit arrangements are likely to be challenged by the existing time frame. PQS holders, on the other hand, potentially have their business planning disrupted under the current arrangements, as finalizing transactions is delayed up to 60 days by the right.



### **Alternative 2 – 30-day extension of the periods to exercise and perform under the right**

Under alternative 2 (the action alternative), after notice of a transaction and receipt of the contract terms, a community entity would be given 90 days to determine whether to exercise its right of first refusal and 150 days to perform under the contract. This extension of the time periods would be intended to better accommodate community entities, while continuing to recognize that time may be of the essence for a PQS holder or buyer under a contract.

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that an extended period for making a decision of whether to exercise a right could be beneficial to entities confronted by that decision. In some circumstances, a 30 day extension to a 90-day period could be adequate for an entity to better evaluate a transaction, access earnest money, make preliminary financing arrangements, and make an appropriate decision concerning the exercise of its right. The extension is likely to be particularly beneficial for decisions that require public notice and meetings. Whether these requirements apply likely depends both on the entity's governing rules and the size of the transaction. Even this extended time period, however, is likely to pose a challenge, if the transaction is large and includes a variety of assets other than the subject PQS. If time to exercise is extended 30 days, concurrently extending the time to perform will maintain the existing 90 day window between the deadline for exercising the right and performing under the contract. Adding 30 days to the periods for exercising the right and performing under the applicable contract may make the right of first refusal more accessible to community entities wishing to enter a contract to protect a community's interests.

Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. PQS holders and those wishing to acquire PQS may invest substantial efforts arranging transactions. Time may be of the essence in these transactions, because of the seasonality of fisheries. Allowing an extended period for a community entity to exercise a right of first refusal may impinge on operations, if the time period extends into the fishing season. The extent of this disruption will depend on the transaction and its timing. If the transaction includes assets other than PQS (such as processing equipment or groundfish fishery assets) the disruption could be of even greater significance. These factors all suggest that an extended time period for the decision of whether to exercise a right could be problematic for the parties to the transaction. Despite the potential benefits to community entities and the disruption for holders and buyers of PQS subject to the right by the proposed time period extensions, the structure of the right overall will limit any effect of the extensions.

Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the entity and to use 80 percent of the IPQ yielded by the transferred PQS in the community in two of the following five years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may limit both the difficulty posed by the time period extensions to PQS holders and the opportunity for community entities to acquire PQS under the right. As a result, the proposed time period extensions are likely to have only minor effects on PQS holders, the parties they might transact with, and community entities.

Overall, this action would have little or no effect on net benefits. The effects of the action are primarily distributional affecting the interests of PQS holders and communities and their representative entities. Any benefits would be derived from the additional power of community entities (and the spillover effects on the communities they represent) that is derived from the additional time to decide whether to exercise the right and the additional time to perform. The costs would arise from the disruption to business and

potential loss of business opportunities that could occur from the extended time period to exercise the right and perform.

## **2.4.2 Action 2 – Action to modify or remove provisions under which the right would lapse**

This action would modify two provisions under which the rights of first refusal lapse. Under the first provision, rights lapse if the IPQ yielded by PQS subject to the right are used outside the community benefiting from the right for a period of three consecutive years. One alternative proposes removal of this lapse provision. The second change proposed under this action would modify a provision under which rights lapse if a community entity fails to exercise the right on the transfer of PQS that triggers the right. The proposed modification would have the right lapse (as is currently the case), but would create a new right in a community entity designated by the new PQS holder. Two options are advanced, one of which allows the community entity that failed to exercise the right to be designated as the new right holder and one of which would prohibit that entity from being designated as the right holder.

### **Provision 1 – remove provision under which rights lapse when IPQ are used outside the community for three consecutive years**

#### **Alternative 1 – status quo – maintain current provisions under which the right lapses**

Under the status quo, processors eligible for an initial allocation of PQS that met right of first refusal qualification requirements were required to establish a right of first refusal contract prior to the issuance of that PQS. Once in place, the contract maintains that right until its holder acquires the PQS, the holder of the PQS uses the yielded IPQ outside of the community for three consecutive years, or the right holder elects not to exercise the right on a transaction on which the right applies.<sup>25</sup>

The provision under which the right lapses after the yielded IPQ are used outside the community for three consecutive years outside the community is intended to sever the right once the community's tie to PQS is lost. The provision, in essence, suggests that the nexus between the community and the processing shares is lost, if the yielded IPQ are used by the PQS holder outside the community for three consecutive years.<sup>26</sup>

Under this structure, the right of first refusal provides communities with a limited protection that is intended to survive only as long as the community maintains its connection to the processing shares, through the use of the yielded IPQ in the community. Depending on the circumstances, over time, connections to processing shares may be lost.

The decline in rights will likely vary across communities and processors. A community with several active processors is more likely to maintain its rights, as movement of processing among plants may occur within the community. Communities with a single active processor, and particularly those that have had processing on floating platforms, are more likely to see their rights dissipate. Regional landing requirements may also affect whether rights are lost, as those limits affect opportunities for relocation of processing. In addition, PQS holders intent on removing rights from their shares can divert processing activity to remove the right. In time, the amount of PQS subject to rights of first refusal will decline. The distribution of the rights among communities and PQS holdings will depend both on the circumstances in

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<sup>25</sup> In one case, a community entity is said to have entered an annual contract establishing the right of first refusal. In this case, the community entity and PQS holder are believed to renew the right annually.

<sup>26</sup> To the extent that custom processing in effect occurs without a transfer of IPQ, those IPQ may be used by a PQS holder outside the community by simply having the crab custom processed in another location.

the communities benefiting from the rights and the PQS holders' processing choices (including choices that could be made for the purpose of extinguishing the right).

The effects of the provision vary across communities and regions depending on circumstances. For example, in the North region, rights of first refusal in St. George have been affected by this provision, as that community's harbor has been inaccessible for several years. Yet, that community's right of first refusal representative, Aleutian Pribilof Island Community Development Association, has used the right to leverage its purchase of processing shares from PQS holders and now holds PQS in several fisheries. The rights held by St. Paul are likely unaffected by this provision, to date, as few locations outside of St. Paul are available for processing in the North region. If alternative processing capacity comes available in other locations, however, St. Paul's position with respect to its rights could be changed by the current lapse provision.

In the South region, Unalaska is well positioned to maintain its rights despite this provision, as several processors have capacity in the community. Kodiak holds rights on relatively small amounts of quota, but has several processors that handle crab. In both cases, however, processing could be moved to other locations by companies that own shore plants in other locations or mobile platforms or through custom processing arrangements. King Cove and Akutan each have a single, large processor. These communities could lose rights, if those processors were to elect to have crab processed elsewhere.

In general, the current provision allows processors to move processing out of a community and after three years cause the right of first refusal to lapse. The provision is premised on a contention that the community's dependence on processing is lost if IPQ are processed outside the community for three years. The extent of the loss of dependence depends on several factors, including the overall reliance of the community on crab processing relative to other processing, the community infrastructure that supports crab processing, and the overall economy of the community. Smaller communities with less diverse economies are likely to suffer a greater effect from the loss of processing activities. This action, however, does not affect whether the community retains processing, but only whether its representative retains a right of first refusal on transfers of processing shares. Regardless of whether a community holds the right, under the status quo, processors may move processing among communities provided the processing shares are not transferred to a different holder. In addition, the lapsing of the right under the status quo merely provides the holder with an additional means of ensuring that a transfer of the shares may be made without the potential interference of the right. In the absence of this lapsing provision, the right can be avoided only by the recipient of the transfer granting a right on future transfers and committing to use 80 percent of the annual IPQ in the community in 2 of the following 5 years. Beyond that commitment, the shares may be used in any community provided the shares are not transferred to a new holder.

The current provision also affects communities that might come to depend on processing after implementation of the program. Since processing may be moved among communities without triggering the right of first refusal (provided the shares are not transferred), it is possible that a community may become dependent on processing activities arising from processing shares on which another community holds a right of first refusal. In these circumstances, the lapsing of the right may prevent the disruption of that more recent dependence that could arise if the original community exercised the right.

**Alternative 2 – Remove the provisions under which the right lapses, if shares are used outside the community for three consecutive years.**

Under this alternative, the provision under which the rights of first refusal on PQS lapse if the yielded IPQ are used outside the community benefiting from the right for three consecutive years would be

removed from the contracts establishing those rights.<sup>27</sup> This change would strengthen the nexus between PQS and the community from which it originated by maintaining the right regardless of whether the yielded IPQ are used outside the community for extended periods. Once triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded IPQ have been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in another community that attracted the processing. At the extreme, this other community's dependence could arise from several years of processing activity. In this case, a community with substantial recent dependence on processing of crab IPQ would have its interests in the underlying PQS superseded by the interests of a community that had historical dependence on the processing that led to the PQS allocation.

PQS holders are also affected by removing the lapse provision. PQS would remain subject to the right regardless of whether the yielded IPQ are used outside of the community for an extended period. To the extent that rights of first refusal diminish the value of these shares, that diminution would be perpetuated. Despite the existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the community to the extent required for avoiding triggering the right or negotiating arrangements with the right holder. In the long run, meeting the minimal requirement for processing in a community to avoid triggering the right may be more difficult, particularly if processing activity is discontinued in some communities. In these circumstances, a community entity could gain significant leverage over the PQS holder and any potential buyer, who might need to add processing capacity to process landings in the community. In any circumstance, a buyer is likely to run some risk, if the right is triggered by a transaction. Even if the community entity is without the wherewithal to exercise the right and perform under the contract, it is possible that the entity could be backed by a competing PQS holder or buyer who wishes to acquire the PQS. The potential for this intervention is likely to lead the parties to most transactions to deal directly with the community entity, unless they structure the transaction to avoid triggering the right.

To the extent that the right is intended to protect the interests of communities with historical crab processing dependence, that protection may be lacking, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares. This alternative would prevent a PQS holder lapsing the right by moving shares outside of the community for three years prior to putting the PQS on the market. Lapsing of the right in this manner simplifies any transaction to sell the PQS (and other assets) by removing the encumbrance of the right. Extending the right indefinitely, as proposed, would require PQS holders to confront the community entity when transferring the PQS, either through triggering the right or through negotiations to avoid triggering the right. This modification would establish a permanent community interest in the PQS for community entities.

The action would have a differential impact across communities. The community entities that lost rights through the movement of processing out of the community (such as St. George's representative) could have rights of first refusal restored by this action. This restoration of the right would strengthen the position of the community entities receiving those rights, in the event a PQS holder chooses to transfer

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<sup>27</sup> The Council should clarify whether any rights that have previously lapsed under this provision should be reinstated. If so, the Council should adapt its motion to provide for reinstatement of those rights.

those shares.<sup>28</sup> Which specific communities would benefit from this action is uncertain, as data concerning the geographic use of IPQ and the potential for transfers is not known. Generally, communities that have seen a decline of processing relative to their historical processing would benefit. Communities that have developed dependence on processing attracted from other communities are most likely to be negatively affected by the action. The extent of any negative effect, however, is uncertain. Even if a right of first refusal is extended by this action, communities that have attracted processing would not be harmed if processing is not shifted back to the community from which it historically originated. In some cases, the processing that has left a community may not return to that community, even if the shares are held by the community representative. This failure to return processing to the community may occur for a variety of reasons, but in general may be a reflection that processing in the community is infeasible or less profitable. For example, St. George's representative holds substantial North region PQS, none of which is processed in St. George, as both processing capacity and the harbor in St. George are not believed to be able to support crab deliveries and processing.

Administration of this action will require that PQS holders and right of first refusal holders report to NOAA Fisheries that contracts establishing the right of first refusal with the lapse provision removed have been entered. The rights would continue to be administered by the parties to those contracts without excessive burden to NOAA Fisheries.

The effect of this alternative on overall net benefits is likely to be very minimal. Any benefit would be realized by entities holding the rights and the communities they represent. By maintaining the right, these entities and communities would maintain an interest in the PQS and associated processing. Communities that attract processing associated with PQS subject to a right intended to benefit another community could experience some loss, if a right holder intervenes in a sale of PQS and redirects processing outside of that community. This redistribution is unlikely to occur, if the redistribution is costly (or substantially decreases the profitability of the processing). Between communities, these changes are likely to be simple distributive effects, with one community losing activity that is drawn to another community. PQS holders could experience some loss of value of their interests, as PQS subject a right of first refusal are likely to lose value because of the constraint of the right. This loss will most likely occur with respect to PQS that are 1) linked by the right to communities that have less efficient processing operations or 2) subject to rights held by entities that are more able to intervene in transactions. More costly operations are likely to be in communities with fewer processors and limited processing activity (where processing operational costs may be greater).

#### **Provision 2 –Right of first refusal alternatives that apply after an entity fails to exercise the right**

Under the current provision, if a community entity fails to exercise the right of first refusal, the right lapses. This action includes alternatives that would either extend the right in the entity that was originally granted the right or allow the new PQS holder to designate a holder of a new right. Under one option, the holder of the new right could be the entity that originally held the right; under another option, that community could not be selected for holding the new right.

#### **Alternative 1 - status quo – if a community entity fails to exercise a right of first refusal that right is lost**

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<sup>28</sup> It should be noted that a portion of the rights held on behalf of St. George are believed to have been relinquished by the community entity based on a negotiated settlement. The Council should clarify whether these rights should be reinstated by this action.

Under the status quo, if a community entity fails to exercise its right when it is triggered, that right is lost.<sup>29</sup> Arguably, an entity should have a single opportunity to exercise the right, as the community's connection to (and dependence on) the processing is lost after a transfer that triggers the right; however, an entity may choose not to exercise a right for several reasons. In some cases, the community and entity may have a strong relationship with either (or both) the new PQS holder and the old PQS holder and may not wish to disrupt relationships by exercising a right. Yet, failing to exercise the right would result in the right lapsing.

While the potential to free PQS from the right may be appealing to their holders, PQS holders may choose to negotiate with right holders rather than risk their intervention in transactions. The potential intervention of right holders is likely to affect the willingness of PQS buyers to pay for those shares, as the intervention could disrupt business planning. To date, rather than suffer this potential disruption, many PQS holders have elected to negotiate with right holders at the time of transactions. The tendency of a PQS holder to negotiate with a right holder (rather than undertake a transaction that triggers the right) is likely to depend on the potential for the right holder to exercise the right. Consequently, it is likely the weakest right holders that have the least protection for the right. Those right holders with the least capacity to intervene in a transaction are least likely to have any leverage for negotiation at the time of a PQS transfer. These right holders are most likely to lose their rights through transactions that trigger the right in which they are unable to intervene. PQS holders may also have an incentive to ensure that rights are lapsed during periods when the right holder has less capacity to intervene to maximize the value of their share holdings.

Community entities without the wherewithal to exercise rights of first refusal are most likely to be harmed by the status quo, as they could lose their rights prior to developing the capacity to exercise those rights. Entities that are relatively well off and can move quickly into a transaction are unlikely to allow reasonable opportunities to exercise those rights pass. These entities could either intervene in transactions by exercising the right or use their position as the right holder to negotiate concessions from PQS holders and buyers.

### **Alternative 2 – perpetuate the right of a community entity that fails to exercise the right**

Under the second alternative, PQS holders would be required to maintain a contract for a right of first refusal in a community entity despite the failure of that entity to exercise the right when it is triggered. This provision could allow a community entity multiple opportunities to exercise a right of first refusal, regardless of whether the entity elected to allow a transaction to go forward that is expressly intended to move processing of the shares from the community. Yet, allowing these transactions to go forward may not be a reflection of the entity's desire to allow the processing to move, but could arise from the inability of the entity to exercise the right. In other words, allowing the transaction to proceed without exercising the right may be more a reflection of the needs and wherewithal of the entity (and the community), rather than their desire to allow processing to leave the community. In these circumstances, it may be that revising the current rule to extend the right after an entity fails to exercise the right provides that entity with an additional opportunity to use the right at a future time (when the entity may be more interested in able to exercise the right). Extending the right in this manner would strengthen the position of an entity holding a right (and, indirectly, the community it represents), particularly those entities that are unable to assert their interests at the time of the offer. Providing future opportunities for exercising the right may be

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<sup>29</sup> In considering this provision, it should be noted that the right is only triggered by transfers of PQS for use outside of the community that benefits from the right. In other words, if the new holder agrees to 1) use 80 percent of the IPQ yielded by PQS in the community for 2 of the 5 years following the transaction and 2) enter a right of first refusal contract for the PQS with the entity, the right is not triggered.

important, if the circumstances and financing of the community entity change or the second transaction is on more appealing terms, which could occur if fewer PQS or different assets are included in the transaction or prices change.

Extending rights in this manner is likely to decrease the value of PQS, by burdening those shares with the right. This loss of value is likely to depend on the potential for an entity to exercise the right. That effect is least likely when the right is extended for entities with few assets, who would derive the greatest benefit from the extension. The extension could be disruptive to communities that have developed a dependence on processing after a sale of PQS and the movement of processing from the original community. If the right is then triggered by a transfer in which the buyer intends to continue to use the yielded IPQ in the second community (and outside of the original community), the exercise of the right by original community could interrupt the dependence of the second community on that processing. In addition, it could be argued that the right holder's dependence on the processing (and connection to the PQS) has been lost by the intervening use of the IPQ in the second community. Whether the second community's dependence is, in fact, disrupted would depend on the buyer's intended use of the IPQ. If the buyer intends to move processing from the second community, the original community's exercise of the right may have no effect on that second community.

Administration of this alternative could be undertaken either through contractual enforcement of obligations by community entities or through more direct oversight by NOAA Fisheries. Administration through private contract by the right holder and PQS holders would require that a right holder monitor transfers of PQS on which it holds a right and intervene through a civil action, if a recipient of a transfer failed to enter a contract establishing the right. This approach would remove oversight responsibility from NOAA Fisheries, which could streamline transactions, particularly if a right holder failed to timely enter a new contract with the right holder. On the other hand, by not requiring the contract as a condition to NOAA Fisheries processing the transfer, it is possible that some transfers may occur without the new holder complying with the requirement to maintain a contract. This approach could jeopardize the position of relatively weak right holders, who do not have the wherewithal to sustain a lengthy contest of PQS holders' actions in court.

Administration by NOAA Fisheries would only entail requiring a community entity holding a right to confirm that a new contract establishing the right has been entered prior to approval of a transfer. This requirement could prevent disputes from arising subsequent to a transfer in which the recipient should have entered a contract with a community entity. On the other hand, NOAA Fisheries could be called on to intervene in a dispute concerning terms of the contract, if one side or the other attempted to modify the terms of a contract establishing the right. This circumstance might be avoided, if the NOAA Fisheries administrative requirement is to simply require the new PQS holder to attest to completing a contract with the applicable community entity. Such a requirement would be less certain in establishing the right, but few PQS buyers are likely to submit a false affidavit, given that a fraudulent submission would be a federal violation.

### **Alternative 3 – Establish a new right of first refusal in a community entity designated by the new PQS holder**

Under the third alternative, the recipient of a PQS transfer that triggered a right that was not exercised would be required to enter a new contract establishing a right of first refusal with a community entity of its choosing in the designated region of the PQS. This alternative is intended to recognize that a second community could become dependent on the processing of IPQ after a transfer that triggered the right. Establishing a new right in the entity representing that community would formally recognize this potential future dependence.

The reason for allowing the PQS holder to designate a community entity to receive the right is that the PQS holder will have control of the use of the yielded IPQ. A closer correspondence between the right and dependence on processing might be developed, if IPQ use is monitored until a threshold dependence is reached (i.e., the shares are processed in a community for a threshold number of years); however, such a system for identifying a future holder would likely be cumbersome and costly to oversee. In addition, allowing the new PQS holder to determine the entity who receives the right is consistent with the control that PQS holder has over the use of the IPQ. Yet, a PQS holder might strategically select an entity that is less likely to have access to the PQS under the right. This could be accomplished in one of two ways. First, selecting an entity based in a community that supports multiple processors (such as Unalaska or St. Paul) could reduce the potential for triggering the right, as several processors are available to process yielded IPQ after a transfer, thereby limiting the potential for the right to be triggered by a transfer. This selection would create a bias for additional processing in these communities, essentially benefitting communities that already have substantial processing in the fisheries.

Alternatively, a PQS holder may reduce the potential for the right to be exercised by selecting an entity with few assets, in which case the entity could be perceived as having little ability to exercise the right. These designations might benefit communities that have less capacity for processing, but that benefit would be contingent on the entity developing the capacity to exercise the right in the event of a transfer. That capacity could be developed through partnerships with others. The assignment of the right to an entity based on the entity's lack of wherewithal to exercise the right is less likely than assignment of the right to entities based in communities with substantial processing capacity. Assignment of the right to an entity based in a community with substantial processing capacity provides the opportunity to avoid triggering the right (through use of the yielded IPQ in that community), rather than risk that an entity develops the ability to exercise the right.

The alternative has **two options** that would define community entities that could be assigned the right after the transfer. Under the first option, the any entity, including the entity that held the right at the time of the transfer could be designated to hold the right after the transfer. Under the second option, the entity holding the right at the time of the transfer could not be designated as the right holder after the transfer. The rationale for excluding the original holder from being designated to hold the right after the transfer is that the entity elected not to intervene and the transfer was acknowledged for use outside the community which the entity represents. In other words, it is assumed that by electing to allow the transfer the entity has effectively relinquished its interest. In addition, a new community may become dependent on the processing of the IPQ, since the new holder has not pledged to use the shares in the original community. In considering this rationale, it should be noted that some entities may have little choice in allowing transfers to go through without exercising their rights. Entities with few assets are unlikely to be able to intervene in transactions (particularly in large transactions). As such, prohibiting a former right-holding entity from being redesignated as the right holder is most likely to harm those entities unable to exercise a right to the benefit of community entities that have more assets.

Administration of this alternative would be similar to administration of the preceding alternative. In filing for a transfer the new PQS holder would be required to either attest to entering a contract with the preceding right holder (if the right was not triggered by the transfer) or attest to a contract with the entity it designates. This attestation could be required as a part of any transfer.

### **2.4.3 Action 3 – Action to apply the right of first refusal to only PQS and assets in the community benefiting from the right**

#### **Alternative 1 – status quo – the right applies to the PQS and all assets included in the transaction regardless of their location**



Under the status quo, a community entity's right of first refusal applies to a transaction that includes the subject PQS. The provision requires that an entity exercising the right accept all terms and conditions of the proposed transaction. Transactions may include a variety of assets, including processing equipment and real estate. Some of these assets may have no connection to the crab fisheries or the represented community. In these instances, a community entity may be unable to effectively use its right for several reasons. Financing may be more difficult to obtain as the cost of these additional assets drive up the transaction price, reducing the feasibility for an entity to exercise the right. The entity may have no justifiable interest in assets unrelated to the community it represents. Acquiring these unrelated assets under the right may effectively require the entity to act as a broker for the assets to avoid maintaining assets beyond its local interests. Entities without substantial capital (or that cannot access capital relatively quickly) may be unable to make the commitment necessary to exercise the right on large transactions that include valuable assets from outside the community.

Although application of the right to a transaction in its entirety may limit the effectiveness of the right for communities, it may also overcome difficulties that would arise were the right to apply only to a subset of the assets in the transaction, such as the PQS and assets in the community. If the right applies to a subset of the assets in the transaction, a valuation method must be adopted for determining the contract amount that must be paid on exercise of the right. The process for valuing the assets would be needed and the time allowed for the exercise of the right would likely need to be extended to accommodate that valuation. Applying the right to the transaction in its entirety also ensures that PQS holders will receive the expected compensation on the sale of the PQS and other assets, if the community entity elects to intervene in the transaction. While allowing a community entity to intervene in a transaction, the disruption of that intervention is limited, since the entity is required to perform under the contract as the buyer would have.

#### **Alternative 2 - apply the right of first refusal to only PQS**

Under this alternative, right of first refusal contracts are required to provide that the right shall apply only to PQS (excluding all other assets that might be included in the transaction). The motion also provides that if assets other than the subject PQS are included in a sale, the price of that PQS shall be determined by a) agreement of the parties, b) if the parties cannot agree on a price, by an appraiser jointly selected by the PQS holder and the entity holding the right.

The motion goes on to outline the process for selection of the appraiser (or appraisers, if the parties do not agree on a single appraiser), the establishment of the price, and the exercise of the right and performance by the right holder (see Figure 1). In addition, the motion allows the right holder to request an appraisal of the PQS, even if the PQS is being sold independent of any other assets. This provision is intended to prevent a PQS holder from dividing a transaction into two parts (one part for the PQS only and the other for other assets), and inflating the price of the PQS to discourage the right holder from intervening. The motion's specific provisions are:

*For any transaction that includes only PQS, the community entity may request that an appraiser value the PQS. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser.*

*The appraiser shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.*

*Timeline for appraisal and performance*

*From the date of receipt of the sale contract by the community entity:*

*Within:*

*10 days: community may request an appraiser*

*20 days: jointly selected assessor chosen, or if the parties do not agree on a single assessor, then each party chooses an assessor*

*40 days: if no single assessor is chosen, the two assessors will choose a third assessor*

*From the date of selection of the assessor (or assessors) by either method:*

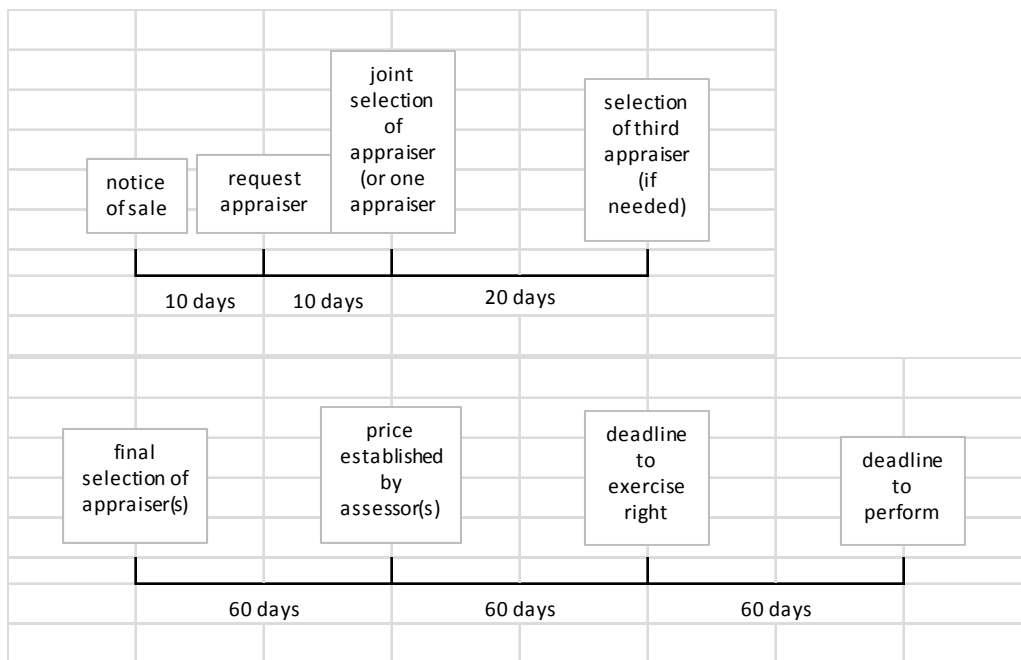
*Within:*

*60 days: the assessor(s) establish a price*

*120 days: notification of community entity of intent to exercise ROFR*

*180 days: community representative must perform under the contract*

*The cost of the assessor will be paid equally by the PQS holder and the community entity. If a third assessor is chosen, the PQS holder and community entity will pay their chosen assessor and divide equally the cost of the third assessor.*



**Figure 1. Timelines for appraisal process and exercise and performance.**

As a precursor to any sale, the PQS holder must notify the community entity of its intent to transfer PQS. On receipt of the notice, the community entity would have 10 days to request an appraiser to value the PQS. The ability to request an appraiser arises whether the transaction includes PQS only or PQS and other assets. In cases in which the transaction is for PQS only, the appraiser would be used to prevent the seller from overvaluing the PQS to dissuade a community entity from exercising the right. In either case, this initial decision, of whether to request an appraiser, is likely to be critical to the effects of the right, as failing to request an appraiser will result in the right lapsing, if the sale involves assets other than the PQS. Also, in cases of sales of only PQS, the appraiser may be important to ensuring that a fair price is applied to the sale.

The 10 day period for requesting an appraiser could be constraining for some community entities, effectively preventing their exercise of the right. Evaluating whether to contract an appraiser may require additional time. An entity is unlikely to want to incur the cost of an appraiser, unless it is likely to

ultimately intervene in the transaction. Consequently, to decide whether to request an appraisal, a community entity will likely need to consider the amount of PQS, the offered price, the availability and cost of appraisers, and potential arrangements for use of the PQS. Depending on the circumstances (including the finances of the community entity and the availability of processing capacity in the community), 10 days to gather and assess information to make this determination may be infeasible. In addition, some community entity structures may require a public meeting or the approval of an administrative board to request an appraiser (as that decision will require the entity to bear the costs of one or possibly one and one-half appraisers). Organizing such a meeting on 10-days' notice may be completely unworkable. These factors suggest that the short time frame for requesting an appraiser, in and of itself, could make the right less advantageous (or, at best, no more advantageous) to some communities than the current provision, depending on whether the right could still be applied to the PQS and any other assets included in the transaction. **If this alternative is selected, the Council should clarify whether a community entity would be permitted to exercise the right on a sale that includes the PQS and other assets (rather than only the PQS). Maintaining the option to pursue a purchase under the existing structure may prevent this alternative from weakening the position of some community entities.**

Should a community entity request an appraiser, the next stage in the process would be to select that appraiser, which is either by mutual agreement or by both parties independently selecting an appraiser, who then jointly select a third appraiser. If three appraisers are selected, these appraisers would then jointly determine a price for the PQS. If the parties agree on an appraiser, the appraiser is required to be selected within 20 days of the community receiving the contract to which the right applies (or 10 days after the deadline for requesting an appraiser). If the parties do not agree, each is required to select an appraiser in that 20 day time period. These two appraisers are given approximately twenty day window (until the 40<sup>th</sup> day after the community representative received the contract) to select the third appraiser. Several factors should be considered in assessing this timeline. Whether it is reasonable to select appraisers in the identified time periods is uncertain. It is possible that parties may have difficulty finding appraisers qualified for determining a price for PQS, as it is rarely traded and the terms of those trades are typically confidential. In addition, any appraiser may also be called on to value assets included in the original transaction other than the PQS, the value of which are affected by severing those assets from the PQS. Given these tasks, a few types of persons, most likely to be familiar with PQS and processing plant and equipment values, would likely be considered to be an appraiser. Brokers, current and former plant operators, and possibly persons working in lending markets for these items might be considered for appraisers. Once identified the terms of any contract for an appraiser must be agreed by the parties and the appraiser. These terms could include travel requirements and some additional terms concerning the scope of the valuation of the appraiser. Lastly, as an important component of the community rights of first refusal, the appraisal process may be politically controversial. Communities could exert political pressure, if dissatisfied with an outcome, while PQS holders and processors may withhold future business, if they are not satisfied with the process. This political factor may deter some persons from performing the appraisal. The most likely means of meeting the deadline for selecting an appraiser would be for both parties to have preselected potential appraisers that could be called on, if needed. While it is unlikely that an appraiser would agree to the position prior to knowing the PQS and assets at issue, identifying appraisers in advance may be necessary to ensuring that the process is functional.

The appraiser (or appraisers) would have 60 days, from the date of selection, to establish a price for the PQS. The appraisers are directed to establish a price for the PQS that represents the fair market value of PQS, but are permitted (but not required) to increase the price to reflect a loss of value of other items included in the original transaction with the PQS. For example, the appraisers may choose to increase the price for the PQS, if the original transaction included both PQS and a crab processing plant, and the value of the plant is greatly dependent on access to the PQS. Any attempt to quantify the effects of the

separation of PQS from the remainder of the items in the transaction would also complicate the price determination. In a remote community with limited processing opportunities, valuation of these other items and the effects of severing PQS from the other assets will further complicate the task of the appraiser. While valuation of PQS may be done through examining paper records (such as tax assessments) and attempting to learn values of PQS from prior sales, if the transaction affects the value of other assets that are not subject to the right, the burden on the appraiser(s) will be greater. In addition, consideration of the effects of separating PQS from other assets could require more extensive research into the plant's value (and possibly a visit to the processing plant) and additional consultation with the seller and buyer, along with others in the industry. The 60 days allotted for this valuation may be inadequate, as this deadline will increase the burden on appraisers (and participants attempting to contract appraisers) as the valuation process may demand a substantial time commitment on short notice. Allowing a longer time period, however, may complicate any transaction that is subject to the right of first refusal.

Once the price is announced by the appraiser, the community representative would have 60 days to exercise its right and an additional 60 days to perform under the contract. These time periods are as currently set out in regulation (without additional time as proposed under action 1 above). Even if action is taken to extend the time period available to exercise the right and perform under the contract, these time periods may be appropriate, as the community entity would have had approximately 80 days or more during which the price for the transaction was determined, to prepare itself to make a decision of whether to exercise the right and perform under the contract. Given this additional time, it is likely that the time for exercising the right under this action will be no more constraining than the extended time period proposed under Action 1.

While primarily motivated by a need to establish a price for PQS that are included in a transaction that also includes other assets, the suggested process allows the right holder to utilize an appraiser for establishing the price, even if the transaction includes only PQS. It is possible that a PQS holder may choose to sell the PQS separately from other assets, as a means of ensuring that it receives its expected return from a transaction. By subdividing the transaction, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets are set at a level acceptable to both of those parties, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS carrying the bulk of the value of the transaction. In such a case, it may not be unreasonable for the right holder to demand an unbiased appraiser to determine an appropriate price for the PQS. To ensure that the right holder is not unfairly disadvantaged, the right holder may request that an appraiser establish a price for the PQS. As with the use of an appraiser generally, allowing an appraiser to establish a price in this manner would delay any transaction and may be costly to both the seller and buyer of the PQS.

The last provision in this process concerns the payment of appraiser costs. The parties would split the cost of a jointly selected appraiser. If unable to agree, the parties would each bear the cost of the appraiser it selects and would split the cost of the appraiser jointly selected by those two appraisers. In considering this provision, the Council should consider that some right holders may have little wherewithal to pay for an appraisal. A PQS holder that perceives an inability of a right holder to pay for the appraisal may show little cooperation in the selection process, as a means to discourage the right holder from advancing with the appraisal process. In addition, the potential need to contract an appraiser for the process could also make a transaction less appealing to a PQS buyer. Even in the absence of any manipulation, the process could be costly to both parties. In considering those appraisers costs, the Council should consider that each party will also bear search costs of attempting to find a suitable appraiser and additional costs of providing information to the appraisers to ensure that its perspective is recognized by the appraiser. In some cases, this may include provision of extensive operational or financial information from community

governments or plant operators. The need for these data and the time it may take an appraiser to determine their effect on the price of the PQS should also be accounted for in development of the timeline for the appraiser's price finding.

An appraiser is likely to use some combination of two approaches to value PQS. Under the first, an appraiser would look at comparable transactions for establishing a value. Few trades of PQS have occurred and little public information concerning those sales is likely to be available, as parties often limit access to this proprietary information. Given this dearth of information, appraisers may choose to resort to an alternative method for valuing assets. The second approach that could be used is to examine the net revenue generation potential of the PQS. Using this approach, an appraiser would consider the production using the PQS applying forecasted prices and costs in an attempt to develop a stream of net returns on the PQS, which should represent its market value. Given the prevalence of custom processing and the information concerning market prices for crab that are developed in the arbitration system, it is likely that at least some information will be available for making such a calculation. Whether reliable information concerning custom processing fees would be available is uncertain. Even with this information, the uncertainties of future markets, TACs, and costs will require that any appraiser make assumptions to develop a price. These uncertainties could be a great disincentive to PQS holders considering a sale that includes other assets to which the right of first refusal applies.

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement, the PQS holder may need to provide something of value to the entity, which could be financial remuneration, a portion of the PQS, or an agreement to use the yielded IPQ in the community for a period of time. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but could receive some compensation for the security it provides by indicating its intent to allow the sale. CDQ groups that represent communities are likely to be better positioned than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests.

Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the required amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder (regardless of whether the Council decides to adopt an amendment that extends the right under Action 2). This approach would apply, only if the person acquiring the PQS is willing to use 80 percent of the yielded IPQ in the community for two of the following five years. After meeting that requirement, the IPQ may be used outside the community without limit.

A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years, thus causing the right to lapse.<sup>30</sup> To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. In addition, this tactic may be ruled out, if the Council decides to extend the rights indefinitely under Action 2.

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<sup>30</sup> This choice may be unavailable, if the Council elects to extend the right in perpetuity.

Despite the potential for PQS holders to avoid community intervention in a transaction, the right will continue to be a consideration for PQS holders looking to dispose of their PQS interest. Currently, PQS holders considering a transfer of their PQS are reported to typically contact the right holding entity. In some instances, these communications have resulted in the acquisition of the PQS by the entity; in others, the PQS transfers have been accommodated by the right holder. In some instances, the PQS transfers have been structured to avoid triggering the right, signaling that the use of the PQS is intended to be continued in the community. The involvement of right holding entities in these transactions is likely to continue in the same manner with any change in the scope of the right.

The administrative burden arising from this alternative could be substantial, if a community entity elects to have PQS appraised. Although appraisal costs cannot be determined, the costs of a single appraiser valuing PQS alone could be as high as \$20,000 while the cost of appraising a plant could be equal or even greater. If three appraisers are used, it is possible that these costs could be as much as tripled. These costs would be borne jointly by the PQS holder and community entity. The costs could increase substantially, if appraisers are asked to determine the decline in the value of assets other than PQS that are included in a transaction.

The process could become more burdensome and costly, if a process of formal appeals to NOAA Fisheries is available, if a dispute arises. If the process is administered through contracts, as is the current system of rights of first refusal, it will operate independent of agency administration. Yet, it is possible that right holders or PQS holders may ask that the agency intervene, if one party believes that the other or an appraiser is not complying with the requirements. These types of appeals could be very time consuming and challenging, as they may require the agency to establish a value (or at least review an assigned value) for PQS, or review other aspects of a privately conducted process. In either case, the review of the case by the agency would delay the completion of a transaction, which could be problematic for the parties to the transaction. **It is very unlikely that NOAA Fisheries could adequately oversee the administration of the provision.**

Overall, this alternative is likely to minimally strengthen the position of right holders by limiting the size of any transaction on which they hold rights of first refusal. Limiting the scope of the right to PQS could also be argued to be more consistent with the rationale for the right, as the community's interest in PQS and associated processing arising from historic processing is the interest that is intended to be protected by the right. Limiting the scope of the right in this manner may be more disruptive to business operations of PQS holders and buyers. By applying the right to only PQS, the ability of these parties to finalize business transactions could be jeopardized. The benefit to any community is likely to be minimal, in comparison to the existing rule, as PQS holders will still be able to avoid the right by agreeing to use the yielded IPQ in the community for a period of years. In addition, the administrative costs (both private and public) of the process for determining the value of the PQS is likely to undercut any benefit, particularly for communities with the fewest resources. The development of a fair and affordable structure for pricing PQS is important to this alternative, but may not be achievable.

### **Alternative 3 – apply the right of first refusal to PQS and assets in the benefiting community**

Under this alternative, right of first refusal contracts are required to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. The process for defining a price for the assets, exercise of the right, and performance are similar to the preceding alternative. In addition, the timeline for those determinations are the same as under the preceding alternative. This alternative, however, includes an additional complexity, in that the assets based in a community must be identified and valued. In one respect, the alternative structure acknowledges this difference. Specifically, the alternative provides that if the parties are unable to agree,

an arbitrator jointly selected by the PQS holder and the entity holding the right. As noted in the discussion of the previous alternative, the motion suggests a sequence of decision making, with the parties first attempting to agree to a price. If unable to come to an agreement, the parties would then use a jointly selected appraiser or, if unable to agree on a single appraiser, each would select an appraiser, who would then jointly select an arbitrator. The rationale advanced for including the third provision is that the appraisers may be required to not only set a value for assets, but also determine which assets are based in a community. It was suggested that an arbitrator may be better equipped to make such a determination. The motion as written suggests that the arbitrator would be used strictly for pricing the assets. The Council should clarify whether an arbitrator would be first used to determine the community-based assets, after which an appraiser would determine the price for those assets and the subject PQS or whether a single arbitrator would be called on to make both of those determinations. In considering this aspect of the structure, the Council should consider whether one person would be well equipped for making both decisions or if the decision making requires two different types of expertise. Regardless of whether one or two authorities are created, it is likely that a two-stage process would be required, with an announced finding of community based assets, followed by a period during which the parties would attempt to agree to a price for those assets. If a price cannot be negotiated, the parties could then request that the appraiser or arbitrator to set a price. Regardless of the decision making authority, **the Council should develop a timeline and specific process for this two-stage decision making.**

As with the previous alternative, several administrative aspects of the process will need to be considered to implement this provision. Since many of these issues apply to both alternatives, the analysis of this alternative relies largely on the analysis of the preceding alternative.

As noted, this alternative will require that a process be developed for identifying items that are based in a community, which would be included in the sale under the right. Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. To develop an amendment, the Council must consider a process for resolving which assets are subject to the right. In any case, it is likely that disputes will arise in the case of assets that are not fixtures (or equipment that could be removed from the community). The Council should consider developing a **standard for determining if an asset is based in a community.** For example, the Council could provide that an asset that is in a community for more than 185 of the preceding 365 days would be considered to be community based. Alternatively, the Council could define community based in a more operational manner, applying the right to assets that were used for processing in the community in the preceding season. It should be noted that under either of these provisions, the rule might be applied to a floating processor used in the community, despite the extensive use of the floater in other locations at other times in the year. If the Council intends assets such as floaters to be excluded from the right, it should define “community-based” in a manner that excludes these assets. To avoid the inclusion of these mobile assets, the Council could adopt a definition of community based that includes only real property (including buildings and other fixtures); however, this definition may be problematic, as mobile items on which an operation depends (e.g., fork lifts) would be excluded from the transaction. To ensure that the right satisfies its intended purpose, the Council should carefully define assets to which the right applies. Despite these efforts, it is possible that the parties could dispute the scope of any items subject to the right.

Assuming that assets to which the right will apply are well defined, values must be established for those assets independent of other assets (from outside the community) that might be included in the transaction. The establishment of the price could use the same process defined for the previous alternative. Under that structure, the parties either agree on a price, select a single appraiser, or each select an appraiser who jointly select a third appraiser. Whether it favors this process or another, **the Council should fully**

**specify the process and timeline for establishing the price for transactions** under this alternative. Under this alternative, the timeline should accommodate the time period for selecting the arbitrator(s) and/or appraiser(s). These time periods should be followed by time periods for exercise of the right and performance.

As under the previous alternative, PQS holders are likely to attempt to limit the disruption of their business by the right. Negotiated agreements with the right holding community entities are likely to be used to prevent intervention in transactions. These agreements are likely to include some concession of the PQS holder, such as financial remuneration, a portion of the PQS, or a commitment by the buyer to use the PQS in the community. These concessions are likely to vary with the negotiating leverage of the right holders. For example, CDQ groups that hold rights are likely to be in a significantly better position to extract concessions than other right holders with fewer assets.

Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the required period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. If the buyer is not willing to use 80 percent of the yielded IPQ in the community for two of the following five years, this method could not be used to limit application of the right.

Depending on the Council's action with respect to the tenure of rights, it could be possible for a PQS holder to eliminate the right by using the PQS outside the community for 3 consecutive years prior to the transfer, causing the right to lapse.<sup>31</sup> Eliminating the right would provide a PQS holder with the greatest flexibility to sell the PQS (provided the Council does not eliminate the provision under which rights lapse).

PQS holders might also subdivide the transaction, selling the PQS and community based assets separately from other assets. Under the structure suggested for using an appraiser for setting the price, the right holder could challenge a determination of the price (if only PQS and community based assets are included in the transaction). The Council should consider whether the right holder can also challenge the finding of which assets are community based. If so, it is likely that a contract to sell PQS and community based assets would in all cases have the potential to be subject to two additional delays. The first period would be used to determine community based assets; the second would be used for determining a price for the assets to which the right applies.

The ability to use various transaction structures to insulate a transaction from the right will depend on the Council's choices for defining assets that are subject to the right and pricing. If pricing is reviewed by an independent appraiser, PQS holders may be less inclined to manipulate contract structures to prevent exercise of the right. Whether contracts are structured to include or exclude certain assets will depend on the circumstances of the parties, as well as the nature and condition of the assets. In some instances, it is possible that items (including those based in the community under any definition) could carry liabilities that the right holder may wish to avoid, creating a disincentive for exercise of the right. In any case, the potential for a PQS holder and buyer to structure a transaction to discourage exercise of the right should be considered. The less the ability of the right holder to challenge the transaction, the more likely the parties are to resort to these tactics. Despite this potential, in fashioning any provisions allowing right holders to challenge the structure of a transaction, the Council should consider that right holders may use challenges to exert leverage on PQS holders. Delaying a transaction may be used to extract concessions

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<sup>31</sup> This choice may be unavailable, if the Council elects to extend the right in perpetuity.



from the PQS holder and buyer. The appropriateness of this practice depends on the purpose for establishing the right.

The administrative burden arising from this alternative cannot be determined until the alternative is fully specified. Processes for determining assets covered by the right and prices must be defined. As with the previous alternative, oversight of these aspects by the agency would be very time consuming and costly to both the agency and parties, particularly PQS holders who might be unable to complete a transaction because of the delay.<sup>32</sup>

Depending on its definition, this alternative should create an opportunity for a community entity to exercise a right of first refusal solely for assets that are most likely of interest to the community that it represents (i.e., the community based assets and PQS). The effects of the action will depend, in large part, on the specific definition of the right. While right holders will benefit from the changes brought on by the action, PQS holders may see some diminution in the value of PQS subject to the right, as transactions that include PQS will be subject to a right that could facilitate greater community entity intervention. The benefit to communities, however, may be minimal, as methods of avoiding the right and its application to a transaction will remain available. In addition, the administrative costs associated with this alternative could be substantial in some cases. The private and public costs are likely to overshadow any potential benefit, particularly in light of the ability of PQS holders to avoid application of the right to transactions.

#### **2.4.4 Action 4 – Action to require community consent to process PQS outside of the community of origin**

##### **Alternative 1 – status quo – IPQ may be used in any community**

Under the status quo, a PQS holder may use the IPQ yielded by its PQS in any location that it chooses (provided it complies with regional landing requirements). This flexibility allows PQS holders to derive the maximum value from their PQS, choosing where and how to process IPQ, with limited geographic constraints. Thus, PQS holders have the option to move processing between communities to other plants that they own or through leasing or custom processing arrangements with other plant owners. This flexibility also allows a PQS holder to both derive greater value from their IPQ and to address contingencies that could arise in season, such as plants being disabled or inaccessible.

While this flexibility to use PQS in any location (within a permitted region) benefits its holders, it also creates some uncertainties for communities that have developed dependency on processing of crab for economic activity and tax revenues. The use of IPQ outside of the community from which those IPQ historically originated (particularly on a large scale) may deprive a community of benefits. Transfer of the use of small amounts of IPQ outside of a community would likely only reduce tax revenues of the community (as the economic activity arising from marginal amounts of IPQ is likely to be minimal). The movement of larger amounts of IPQ from a community will likely have a broader effect on a community. Not only are tax revenues affected, but also economic activity in the community that is generated by activity at the plant, vessels making deliveries and their crews, and processing employees. This activity often sustains support businesses that are a critical part of the economies of most communities with processing activities.

The risk of the relocating of IPQ processing varies across communities and plants. Risk to the community is reduced, if a plant owned by a PQS holder processes several species. These plants, which depend on a

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<sup>32</sup> It should be noted that the delay could prevent a transaction that is based largely on assets unrelated to the crab fishery that are brought into the transaction because they are based in the applicable community.

variety of production, are less likely to use IPQ outside of a community (or transfer it to another person likely to use the IPQ outside the community), as crab processing is likely a part of a balanced portfolio of activities at such a plant. American Fisheries Act (AFA) plants are the least likely to transfer processing outside of a community, in part, because the transfer of pollock between processing plants and cooperative associations is limited.<sup>33</sup> These plants most likely have a dependence on the pollock fishery that ensures their ongoing operation in the future.

Communities with multiple processors also enjoy an advantage of having other local processing resources to retain landings. The opportunity to move IPQ for use at another local processor (through lease or custom processing) may reduce the potential for IPQ leaving a community in the event a plant is disabled or cannot accommodate certain landings. In addition, it is also possible that a future purchaser of the PQS would be the owner of a local plant, who would avoid triggering the right of first refusal by agreeing to use IPQ in the community. In addition, communities with more expansive support industries are also less likely to lose IPQ processing.

A community's risk of losing IPQ processing is also affected by the presence of other processors (and processing locations) in the region. North region communities have less risk of movement of IPQ, as those areas have few processors.<sup>34</sup> In the South region, several plants process crab and could accommodate crab deliveries, creating greater opportunity and risk of processing being relocated from a community. Despite these mitigating factors, all communities have some risk of losing IPQ processing under the status quo, as the use of IPQ are not geographically constrained (beyond the regional landing requirements).

Unalaska likely has the least risk of losing IPQ processing. Several Unalaska crab processors have expansive multispecies operations, participating in the AFA and other groundfish fisheries. The community also has extensive support industries that benefit both processor plants and the vessels that deliver to those plants. Although several other communities in the South region have processing capacity, Unalaska's relative proximity to the crab fishing grounds and developed industry reduce its potential to lose IPQ processing under the status quo.

As home to a single large multispecies AFA processing facility, Akutan benefits from a plant with expansive operations. The characteristics of the plant limit the potential for IPQ to be transferred away from the plant. On the other hand, as a single plant in a community in which support services are supplied almost exclusively by the plant, the community has no other options for IPQ processing.

King Cove has a single AFA multispecies AFA processing plant. The plant's broad portfolio of processing reduces the potential for IPQ processing to move from the community. The community's processor, however, is affiliated with two other processing operations in the crab fisheries. Although the processing operations of the King Cove plant and its affiliates are currently independent, the opportunity

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<sup>33</sup> An American Fisheries Act cooperative may transfer a portion of its allocation to another plant annually. Depending on the circumstance, this may lead to the removal of a vessel from the cooperative and its processor association, with a long term reduction in deliveries. Through these vessel moves, a community could incrementally lose deliveries from its local AFA pollock shore plant. At times, these moves have occurred with the consent of the associated processor, but they may also occur independent of the processor. In sum, the AFA cooperative/processor association structure has some limitations on the movement of landings by a cooperative from a plant (and indirectly a community).

<sup>34</sup> It should be noted that the action proposed would only affect IPQ that are currently subject to rights of first refusal. Consequently, The Western Aleutian Islands golden and red king crab fisheries and the Bering Sea *C. bairdi* fishery are unaffected by this action.

to move processing to these affiliated operations increases the potential that the benefits of IPQ use could be lost to the community. Notwithstanding this affiliation, the AFA qualification of the plant and its expansive operations in other fisheries increases the likelihood that substantial amounts of IPQ will continue to be processed at the plant (and in the community).

While several processors maintain operations in Kodiak, only a small portion of the PQS originated in that community. Despite the small allocation of IPQ originating from Kodiak, retaining that crab processing remains important to the community. Although the community has extensive support industries and several processors capable of handling landings of crab, the potential for the use of IPQ to leave the community is increased by its distance from the grounds. With relatively large flexibility to move processing, it is possible that IPQ processing could move out of the community periodically or entirely over time.

False Pass and Port Moller met the crab processing threshold needed to create a right of first refusal under the rationalization program. Neither of these communities has had any crab processing since the program was implemented. These communities remain unlikely to have processing in near future, as there are currently no known plans to introduce crab processing.

In the North region, St. Paul has some potential to lose processing of IPQ should St. George develop accessible processing capacity. This potential is reduced by the accessibility of the harbor in St. Paul (particularly when ice free) when compared to the St. George harbor and the capacity of the plant in St. Paul. Until St. George's harbor is considered reasonably accessible and processing capacity develops in the community, St. Paul is not likely to lose any processing of IPQ in the near future.

St. George has yet to have processing occur within its boundaries under the rationalization program. Whether processing will return to this community is uncertain, but the community has clearly suffered a decline in processing relative to historic processing recognized by the PQS allocation, due largely to factors other than the rationalization program. Under the status quo, processing is not likely to return to the community until deliveries of crab and processing are deemed physically practical and a processor elects to introduce capacity.

**Alternative 2 –IPQ may not be used outside of the community benefiting from the right of first refusal with the consent of the community entity**

Under this alternative, IPQ would be required to be used in the community benefiting (or formerly benefiting) from the right of first refusal, unless movement of processing outside the community is consented to by the right holder entity representing the community.<sup>35</sup> The potential for IPQ to be used outside of the community from which it originated varies across PQS and IPQ holders and communities and may not be predictable. IPQ holders are likely to wish to move their IPQ outside of a community to realize operational efficiencies or address issues with processing capacity and costs. While a community entity might consent to movement of processing, that consent is likely to be withheld unless the entity sees a benefit associated with giving consent. This benefit is likely to be some form of compensation, although it is difficult to predict the specific nature of the compensation. These benefits may include compensation for lost tax revenues, a commitment to bring additional processing to the community at a later time, or possibly even good will derived through the improvement of the community's relationship with a PQS holder. Consent without any compensation of future processing or tax payments is more

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<sup>35</sup> A previous version of the Council's alternatives would have required the consent of the community itself to move processing. The alternative was revised to require consent of the right holder, as that entity might be more equipped to respond to requests to move processing from the community.

likely, if circumstances are perceived to be beyond the control of the PQS holder (such as in the case of emergencies) or if the amounts of IPQ are small. On the other hand, it is possible that an entity may simply elect not to grant consent to movements of IPQ in these circumstances, particularly if it has a limited or poor relationship with the IPQ holder or the IPQ holder refuses to consider compensation.

The willingness of an entity to provide consent to a processor moving IPQ processing outside of the community could also be affected by several factors. Most importantly, an entity's interests may not be perfectly aligned with the community's. While an entity will generally serve the community it represents, in some cases, an entity may have interests that differ from the community's. In these cases, an entity may provide consent based on compensation that would not be acceptable to the community. In addition, it is possible that the compensation may benefit the entity more than it benefits the community or may not be fully received by the community, but instead are maintained and distributed by the entity.

Assuming that the community entities interests are perfectly aligned with the community's, the community's relative dependence on the IPQ processing will affect a entity's decision of whether to consent to movement of IPQ processing from the community. An entity representing a community with several large multispecies plants may be more willing to consent to a processor moving a portion of its IPQ processing outside of the community, than an entity representing a community with a single plant engaged primarily in crab processing. Interactive effects, such as whether fleet services may decline with a decline in landings, may also be a consideration of an entity deciding whether to consent to allow IPQ to be processed outside the community. Also, the relationship of the entity with the specific processor could influence the entity's decision. A processor with a long, sound relationship with a community and its representative is less likely to be denied consent to moving IPQ processing. These factors make the effects of the action very case specific and also more difficult to predict.

Given the limit on the movement of IPQ processing from its originating community, this alternative is likely to be a barrier to processors achieving efficiencies in processing. Consolidation and the coordination of IPQ processing across plants located in different communities will be prevented unless consented to by entities representing the communities from which the IPQ originated. These entities are unlikely to agree to any long term movements of processing, as the local benefits derived from that processing (in the form of both tax revenues and economic activity) will be lost.<sup>36</sup> Even single year movements may be denied, if the entity perceives no benefit from giving its consent to a move. The denial could have ramifications not only for processors, but also for harvesters. For example, at the end of a season an IPQ holder may have a small number of unused IPQ designated for a particular community. If the shares do not amount to a reasonable amount to deliver and process, it is possible that the either the IPQ holder or the holder of matched IFQ may not see it as worthwhile to use their shares for this isolated delivery to the community, effectively stranding both the IFQ and IPQ.

While the proposed action is constraining on the geographic location of use of processing privileges, it bears some resemblance to some other limitations currently in place. Most obviously, the action would resemble the regional constraints that apply to most PQS and IPQ under the program. The Council recently adopted two exemptions to these regional landing requirements. In the West region of the Western Aleutian Islands golden king crab fishery an exemption from the regional landing requirement would require the consent of both the communities of Adak and Atka. An additional exemption provision, applicable to all other fisheries, would generally require the consent of the holder of the right of first

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<sup>36</sup> Only if a processor were willing to give up use of the IPQ, if the consent is withheld, would such an entity consent to the move. In this circumstance, the community is still likely to negotiate some compensation for the movement and may limit the term of the consent to a period of years.

refusal. That exemption is intended to be agreed to by the entity only in the case of emergencies that prevent compliance with the regional landing requirement (rather than for the purpose of operational efficiencies). This action, as proposed, differs in a few important respects. The Council has not suggested any circumstances that should (or should not) justify a community's decision to withhold consent to moving IPQ processing.<sup>37</sup> The Council's regional exemption action also suggested certain mitigating measures that IFQ and IPQ holders should take to avoid the need for the exemption, as well as, possible arrangements that could be used to compensate the community for the loss of processing activity. This action, on the other hand, allows the entity full discretion concerning whether to consent to moving processing. The greater latitude provided by this action creates greater uncertainty concerning the appropriateness of any entity's decision to withhold or grant consent. For example, an entity could condition the movement of processing on financial compensation, ignoring all other issues. On the other hand, an entity could have a policy of not granting consent under any circumstance. While the entities may choose to disregard the Council's intent, the absence of any guidance from the Council on the circumstances or conditions applied to any consent to move processing increases the uncertainty of the effects of the action (and the appropriateness of any entity decision concerning whether to consent to movement of processing).

A second management program with aspects that resemble this action is the American Fisheries Act pollock cooperative program. Under that program, specific processing plants are qualified to participate in the pollock fishery through associations with harvest cooperatives. Any cooperative is required to deliver 90 percent or more of its annual pollock harvest to its associated processor. Although no community authority exists with respect to the geographic location of processing activity, the processing privilege is associated with a specific plant. Shore plants access the processing privilege of their cooperative associations through deliveries to the participating plant. While a vessel can deliver a portion of its cooperative's annual allocation to another plant and change long term processor associations through those redirected deliveries, the program structure creates a processing privilege associated with a specific plant (which in the case of shore plants, is a specific geographic location). While a processor may use the latitude of the AFA cooperative structure to redirect some landings to another plant, the constraint on deliveries has the effect of limiting the processing privilege geographically. Admittedly, the AFA structure – in both its harvesting and processing privileges – is very different from the structure of the crab program. Yet, that program's processing privileges (at least with respect to shore plants) are effectively subject to geographic constraints with some similarities with those proposed under this action. Despite this similarity, the most important distinguishing characteristic of the AFA processing privileges is that the movement of deliveries (and thereby processing activity) is independent of consent of any community representatives.

The effects of this action are difficult to predict and likely vary across processors. While all IPQ processors would prefer some flexibility to move some IPQ processing geographically, companies with a single crab plant may wish only to move small amounts of IPQ. These companies may wish to redirect some landings to prevent gaps in processing activity or to accommodate other processing at their plants, but (provided the plant is processing crab) are likely to wish to receive all landings at their plants. Single crab plant companies that operate in communities with several processors (such as Unalaska) may not need to have their IPQ processed outside the community under any circumstances, as a variety of plants could be contracted under custom processing arrangements, should the need arise. A plant in a community without other processors, however, could be greatly disadvantaged, if an entity is reluctant to

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<sup>37</sup> It should be noted that the statement of intent concerning the use of the emergency exemption from the regional landing requirement will not be incorporated into regulations. Consequently, community entities will have the ultimate discretion concerning whether to grant an exemption.

consent to moving processing outside the community. If, for example, a plant is disabled for a period of time, an entity may be uncertain whether the circumstances at the plant could be addressed before the end of the season. The entity may be reluctant to consent to relocating processing activity, to ensure that the plant owner exerts efforts to reopen the plant. In the absence of consent, the plant owner's only alternative may be to attempt to bring a floating processor to the community to ensure that its IPQ may be processed. Depending on the circumstances, the processor may have obligations to IFQ holders to accept deliveries, further complicating the situation.

The market for custom processing services could also be affected by this action. An IPQ holder seeking custom processing of some of its IPQ will only be able to contract with processors in the community designated on the IPQ, without the consent of that entity. In some circumstances, the market leverage of a processor providing custom processing could be considerable, if only a single crab processor is available for processing when the services are sought. Whether a processor would assert this position depends on its relationship with the other processor, including any custom processing relationship. Overall, the effects of the action on a PQS holder will vary depending on the processor's circumstances, including an entity's willingness to accommodate a processor's preferences (such as its financial, marketing, and contractual interests).

The action would also affect the values of PQS, likely segmenting the market for PQS into several markets. Any PQS holder must either process yielded IPQ in the community benefiting from the right of first refusal or obtain the consent of the entity representing the community to move processing to another location. In other words, PQS will be valued based on the return from processing IPQ in the specific community that holds the right of first refusal and the potential to gain consent of the entity representing the community to moving processing to another location. So, PQS subject to a right of first refusal in a community with relatively high processing costs would be valued less than PQS subject to a right of first refusal in another community with lower processing costs. In addition, the value of the PQS may be entirely dependent on access to processing capacity in the community benefiting from the right. For example, in a community with a single shore plant, any PQS subject to the right would be valued relative to the potential to access the plant in the community (or introduce additional capacity to the community). In a community with several shore plants, it is possible that PQS may carry a higher value, arising not only from the competition among plant owners to acquire the PQS, but also ability of an IPQ holder to induce competition among shore plants for custom processing services.

In addition to the effects of the action on future PQS transactions, the Council should also consider the effects of the action on transactions that have already taken place. Although one cannot know the intention of persons who acquired PQS to date, it is possible that the limitation of this action could prevent a new holder of PQS from using IPQ in a manner anticipated at the time of the transaction. For example, if a person who acquired PQS, did so intending to use the yielded IPQ in a community other than the community from which the PQS originated, it is possible that those expectations could be thwarted by this action. Table 8 shows that a large amount of PQS has been transferred since implementation of the program. In interpreting the effects of these transactions, it should be considered that several types of transactions are represented by these numbers. Some transactions are arm's length transactions by independent parties. Others are simply changes in the name of the share holder or consolidation through the formation of new companies or partnerships. In addition, some ownership changes of a corporation may occur without changes in named holder. Consequently, these transfer data should not be viewed as either complete or exclusive. In considering the effects of the action on share values, it should be noted that some share acquisitions are likely of PQS from communities with several processors and by persons who have no intention of using the IPQ outside the community in which the PQS was generated. In addition, some PQS are held by the original right holders and a few transactions

are for PQS that were not subject to rights of first refusal.<sup>38</sup> In some of these transfers, persons may not have paid any premium based on the flexibility to move IPQ processing among communities.<sup>39</sup>

While PQS holders may be disadvantaged by the restrictions proposed by this action, communities with historic and continuing crab processing and dependence on IPQ crab processing are likely to benefit from the action. The benefit derived by communities from the action is likely to vary across communities, based on the circumstances, particularly the role of crab processing in the communities. Generally, the action gives communities the opportunity to benefit either from continued processing of IPQ (in proportion to the communities rights of first refusal) or possible compensation extracted on the relocation of that processing to another community.

**Table 8. Number of persons who have acquired PQS and amount of PQS acquired since the initial allocation by fishery (for fisheries subject to rights of first refusal) (2012).**

Fishery	Number of purchasers	PQS units	Percentage of the PQS pool
Bristol Bay red king crab	6	91,420,986	22.7
Bering Sea <i>C. opilio</i>	7	201,706,536	20.1
Eastern Aleutian Islands golden king crab	5	2,191,667	21.7
Pribilof red and blue king crab	2	4,893,835	16.3
St. Matthew Island blue king crab	4	4,169,060	13.9
Source: NMFS RAM data			
Includes all PQS transfers, a portion of which may not be subject to rights of first refusal and a portion of which may be held by the former right holder.			

Unalaska, with several large processing plants and a large basis of support industries, is a preferred processing location for many of the holders of PQS that would be designated for Unalaska under this action. As a result, it is unlikely that substantial departures of IPQ processing from Unalaska would occur under any circumstance. On the other hand, it is possible that Unalaska could attract processing from other locations in the absence of the geographic restrictions on transfers proposed by this action. Consequently, it is possible that Unalaska could have less processing under this alternative (in comparison to the status quo). With relatively expansive multispecies processing and related economic activity, the effects of movements of relatively small amounts of IPQ processing from Unalaska is likely to be less profound than might be experienced by other communities with a small economic base. Consequently, the effects of this alternative on Unalaska (in comparison to the status quo) are not likely to be dramatic. Holders of PQS subject to an Unalaska designation are also likely to be less constrained by this action as their IPQ could be processed directly by the holder (if that holder owns or has access to one of the platforms in Unalaska) or by one of the other platforms in the community under a custom processing arrangement. The entity representing the community is also likely to be more accommodating of PQS holders who are interested in moving small amounts of IPQ processing from the community for

<sup>38</sup> The portion of the PQS pool not subject to rights of first refusal in the fishery is less than 5 percent of the pool in all of these fisheries, except in the St. Matthew Island blue king crab fishery, in which approximately 65 percent of PQS are not subject to rights of first refusal.

<sup>39</sup> While these premiums may exist, it should be noted that the Congress, the Council, and NOAA Fisheries all emphasized throughout the development of this program that all fishing and harvesting privileges created by the program are subject to modification and revocation without compensation. Some participants in the program may reduce prices of shares to accommodate the risk that actions of this type may be taken by the Council.

brief periods or under exigent circumstance. Whether the entity will require some compensation for its consent to those moves cannot be predicted and will depend on the amount of IPQ at issue and the relationship of the community and the processor requesting the consent. As a result of the size of its processing sector and its broad-based multispecies processing dependence, Unalaska and holders of PQS carrying an Unalaska designation are unlikely to be greatly affected by this action.

This action would further increase the certainty that IPQ crab processing will continue in Akutan. As home to a large, multispecies, AFA qualified processor, Akutan is likely to retain its processing of IPQ for the foreseeable future under any circumstance, and is likely to be affected only to the extent that marginal amounts of IPQ remain in the community unless it consents to their movement. The action would ensure that should the holder of Akutan designated PQS elect to move IPQ processing, Akutan's representative could intervene to either prevent that move or receive compensation. Under this alternative, requiring consent to move IPQ from the community would prevent the holder of Akutan designated IPQ from achieving efficiencies in the movement of small amounts of IPQ processing for operational purposes.

Similar to Akutan, this action will provide King Cove with the ability to prevent movement of any King Cove designated IPQ from the community. The likelihood of substantial amounts of IPQ processing moving from King Cove is uncertain, but appears to be relatively small at present. The relatively large multispecies AFA plant in the community is likely to retain most processing of crab, as long as it continues to process crab. The affiliation of the plant with crab plants in other communities creates some uncertainty concerning whether crab processing could or would leave the plant at a future time. This action would ensure that processing of IPQ crab could not leave the community without the consent of the community's representative, effectively allowing that entity to intervene to prevent the move or receive compensation that it deems adequate.

Kodiak is designated on a relatively small share of the PQS pools. Despite the size of its share, the stated importance of crab processing to Kodiak suggests that it will prevent the departure of processing of IPQ, if this action is adopted. The effect of the action on PQS holders is mitigated to some extent by the number of processors and their capacity. Several processors in the community could accommodate processing of the IPQ. Notwithstanding this processing capacity, it is likely the action does diminish the value of Kodiak designated PQS by limiting the opportunity of its holders to achieve efficiencies through consolidation.

The PQS designated for Port Moller and False Pass present particular problems under this action. Neither of the communities has supported processing since the program was implemented. Port Moller has no year round residents. False Pass has not supported any crab processing since the program was implemented. In addition, all historic processing at False Pass was on a floating processor. This action would either compel the holder of False Pass designated PQS to either reintroduce processing to that community (most likely through a floating platform) or obtain the consent of the community's representative to relocate the processing of the yielded IPQ. Acceptable terms of any such consent cannot be predicted. In communities with no processing, it is possible that the community could extract nearly all of the value of the PQS for consenting to the movement of processing. Alternatively, it is possible that the IPQ (and accompanying matched IFQ) could be stranded.

In the North region, only St. Paul has supported processing since the program was implemented. Given St. Paul's dependence on crab processing for both tax revenues and economic activity, the community may rarely (if ever) consent to movement of St. Paul-designated IPQ from the community. Any consent would likely be conditioned on appropriate compensation, likely in the form of commitment to future additional landings or monetary compensation.



St. George, the only other community with designated PQS in the North region, has not had crab processing, since the program was implemented, largely due to lack of suitable harbor access and processing infrastructure. Yet, the action would provide St. George's representative with the authority to prevent St. George designated IPQ from being processed outside the community without the its consent. Given these circumstances, it is possible that St. George's representative could use the action to compel either the development of processing capacity in the community or a PQS holder to pay compensation for using its IPQ in St. Paul. A related concern is that the harbor in St. George, where processing is most likely to occur, is not perceived to be safe for crab deliveries by many participants in the fisheries. To the extent that this action could compel deliveries into St. George (absent the consent of the community's representative to the movement of those landings from St. George), it could be perceived as providing the community's representative with unreasonable leverage in any negotiation concerning the redirection of landings to other locations.<sup>40</sup>

An additional consideration in the development of this action should be its potential to affect safety (particularly in the North region, where only St. Paul has had crab deliveries under the program, to date). The Council recently took action to create an exemption to regional landing requirements on IFQ and IPQ, which is intended to allow for landings to be redirected out of region under emergency circumstances. Generally, the exemption requires agreement of the IFQ holder, the IPQ holder, and the holder of the right of first refusal on the IPQ. While not directly limiting the exemption created by that action, the current action would require a new entity (the community benefiting from the right of first refusal) to consent to the movement of IPQ under any such regional exemption. By doing so, this action could either create an unreasonable delay or possibly altogether prevent a landing from being redirected outside a region, as intended by that exemption. Without the ability to exercise the exemption, a vessel operator could face an unreasonable, increased incentive to expose a vessel to risks to comply with the community landing requirement created by this action.

Independent of the regional exemption action, this action could also create some safety risks, as it would be a barrier to the movement of processing activity geographically. For example, if a plant becomes inaccessible, it may not be feasible to quickly redirect a delivery to another location, as consent to the movement will be required prior to the change in delivery locations. Although a community may consent to the movement of processing, no foundation similar to the Council's statement of intent for the regional exemption is proposed for this action. As a result, it is possible that a community may delay consenting to the movement of IPQ processing simply because it is not prepared to consider whether the circumstances might justify its consent or whether conditions (such as compensation) should be attached to its consent.

The administration of this action will require that NOAA Fisheries geographically monitor the use of all community designated IPQ. NOAA Fisheries is currently revising its recordkeeping to collect this information for all landings (particularly landings by floating processors). Monitoring compliance with the landing requirement will then only require that this location information be compared with the designation on the IPQ used for a landing. Assuming a community has not consented to moving processing of IPQ, any use of IPQ outside a community would be a violation of the landing requirement.

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<sup>40</sup> It should be noted that a substantial share of St. George designated PQS is held by its representative, the local CDQ group. Given this holding, it is unlikely that the entity would require itself to process in St. George unless it perceived processing in the community as advantageous to its operations and providing reasonable returns from its share holdings. It might be possible for this representative to use its authority as the entity representing St. George to force other holders of St. George designated shares to either process those shares in St. George or pay unreasonable compensation to move the shares out of St. George.

Administration of the system of consents would require NOAA Fisheries to establish a process for recording consents. To administer the filing of these consents (and permitted moves), communities would need to submit to NOAA Fisheries documentation establishing the authority of specific persons (or representatives) to provide the consent of the community. These filings could be required to be made and updated as needed. It is possible that delays of consents would arise, if a community failed to keep these delegations up to date. These could affect the ability of communities to consent to the movement of landings to address emergencies, as well as the ability of participants to use residual IFQ and IPQ at the end of the season (if communities are willing to consent to moves of IPQ processing to facilitate the use of those shares).

This action would extend new protections to communities that historically processed crab (to the extent that history is acknowledged under the rights of first refusal). While the action would strengthen the position of these community entities considerably, the action would affect the ability of processors (and possibly harvesters) to achieve efficiencies and derive benefits from the fisheries. Movement of shares from a community for any purpose would require consent of the community representative. Processing consolidation to realize production efficiencies could only take place, if agreed to by those entities. End of season consolidation of small amounts of remaining IFQ (and IPQ) in a single trip could also require the consent of several community entities. In addition, any attempt to respond to an emergency or redirect a landing that might be prevented by an unforeseen circumstance would only be possible with community entity's consent. Even if these consents are reasonably granted, delays could arise, if the entities are unable to respond to requests quickly. In deciding this action, these operational concerns should be balanced against community interests that some may believe are not adequately protected under the current program measures.

#### **2.4.5 Action 5 – Action to require additional notices to NOAA Fisheries and right holders**

This action is intended to establish new notice requirements for PQS holders. These notices would be intended to improve the information available to both NOAA Fisheries and right holders to ascertain the status of rights and to allow right holders to more effectively assert their interests under the rights.

##### **Alternative 1 – status quo – maintain current information concerning the use and transfer of processing shares**

Under the status quo, a limited amount of reporting on and monitoring of IPQ use and IPQ and PQS transfers is required. NOAA Fisheries has and continues to have information to monitor the use of IPQ by port when deliveries are made to shore plants. Since the 2009-2010 season, NOAA Fisheries has collected locational information from stationary floating processors that received landings from catcher vessels. Consequently, NOAA Fisheries is able to monitor use of IPQ, as needed to determine whether a right of first refusal lapses because of use of IPQ outside of a designated community for three consecutive years. These data, however, are not available to right holders. As a result, a right holder may lose its right without knowing that the right has lapsed.

Any transfer of PQS or IPQ must be submitted to NOAA Fisheries to be processed. NOAA Fisheries, thereby, has knowledge of any transfer of IPQ or PQS. In addition, any application to transfer processing shares for use outside of the community benefiting from the right (which would trigger the right) will not be acted upon for a period of 10 business days. This delay in processing the transfer is intended to allow time for the right holder to object to the transfer. If the transferor is following the requirements of the right, it would have notified the right holder of the transfer and provided the requisite opportunity for the right holder to exercise the right. If a dispute were to arise in that process, the right holder could then

attempt to prevent the transfer (possibly requesting a court order) in the 10 business days prior to the transfer being processed. Yet, it is possible that the right holder may not be aware of the transaction. In that instance, the transaction may be processed, without the right holder having any opportunity to intervene. In this case, the right holder may have some claim against the original PQS holder or new PQS holder (since the right would have been triggered), but that case could be compromised by the transaction that has already been processed.

Regulations also provide that a PQS transfer for use of IPQ inside a right holding community will not be approved unless the right holder provides an affidavit stating that it waives its right permanently or the new PQS holder provides an affidavit stating that it has entered into a contract with the right holder establishing a new right. These requirements are intended to ensure that a right holder's interests in the PQS are maintained (unless the right holder has waived those rights). These provisions should be effective in providing right holders with a reasonable opportunity to maintain their interests in the event a transfer occurs that does not trigger the right.

Although the measures in current regulations are intended to maintain the interests of right holders, those right holders may have little knowledge of the status of the shares on which they hold a right. For example, a right holder may have no information on the use of IPQ on which it holds a right. Given this uncertainty, it is possible that a PQS holder's use of IPQ outside of a community may lead to a lapse of rights, unbeknownst to the right holder. NOAA Fisheries suffers from similar information gaps. Although NOAA Fisheries now has information on the location of use of IPQ, it may not know when a PQS holder believes that the right applicable to its PQS has lapsed. This uncertainty and confidentiality requirements prevent any comprehensive, fully reliable public reporting of the status rights of first refusal. Such reporting could be useful for evaluating the effectiveness of rights of first refusal, as well as for right holders evaluating the status of their rights.

### **Alternative 2 - Require additional notices to right holders and NMFS**

The second alternative for this action would require several notices from PQS holders to NOAA Fisheries and right holders to ensure that better information is available to managers, the public, and right holders concerning the status and effectiveness of rights.

The first requirement would be for PQS holders to provide prior notice of any transfer of IPQ or PQS to the right holder. This notice would ensure that the right holder had information concerning transfers of shares to allow that right holder the opportunity to intervene (if needed or desired) to maintain or protect its interest in the shares or exercise its right. Without prior notice of a transfer, the right holder may not be aware of a transfer in time to protect its interests prior to the transfer. In such a case, the right holder may be left attempting to pursue remedies after a transfer, which could be costly and less effective than intervening prior to the transfer.

The second requirement would be for either the PQS transferor to certify to NOAA Fisheries as a part of its application for a transfer that it either provided the right holder with the opportunity to exercise its right of first refusal (if the right was triggered by the transfer) or for the new PQS holder to certify that it has entered a new contract for establishing the right (if the right is not triggered by the transfer). The current rule requires either a delay on processing a transfer of 10 business days (if the right was triggered) or certification of the contract (if the right is not triggered). By adding a requirement that the transferor certify that the right holder had the opportunity to exercise the right (if the right was triggered), right holders can be more certain to have had the opportunity to intervene in a transfer that triggers the right.

The third requirement would be for each PQS holder to report to NOAA Fisheries and any right holder whether the right of first refusal has lapsed as a result of use of IPQ outside the subject community for

three consecutive years. Although NOAA Fisheries may have information concerning landings locations that could be used to determine whether the right has lapsed, requiring the PQS holder to report whether it believes the right has lapsed to both NOAA Fisheries and the right holder could limit the number of disputes that might arise from transfers that the PQS holder might assert are not subject to the right. In addition, ensuring that NOAA fisheries and the right holder have more complete information concerning the lapsing of rights can aid in understanding the effectiveness of rights in protecting community interests.

The last notice would be from each PQS holders to any holder of rights on that PQS notifying the right holder of the location at which IPQ are used. This notice would be intended to inform right holders generally concerning the use of processing shares on which its right applies, as well as concerning the use of the IPQ outside the designated community, which could result in a lapse of the right.

Some of the controversy surrounding the efficacy of rights of first refusal have centered on the lack of information concerning use and transfers of processing shares. This alternative is intended to ensure that NOAA Fisheries and right holders have accurate information concerning the use of processing shares, transfers, and compliance with obligations arising from rights of first refusal. This information can be used by right holders to protect their rights and exercise rights, when the right of first refusal is triggered. Providing NOAA Fisheries with additional information will allow the managers (including NOAA Fisheries and the Council), stakeholders, and the public to better understand the effects of the rights on participants in the fishery and stakeholders.

This alternative would increase annual administrative costs slightly, as NOAA Fisheries would need to process information received from PQS holders. The burden would be expected to be relatively minor, as few entities hold PQS and the amount of information submitted is expected to be relatively small.

## **2.4.6 Conclusion**

In its current form, the right of first refusal provides a community entity with some leverage in the event a PQS holder wishes to transfer PQS. Yet, a PQS holder may take several measures to limit the effectiveness of the right. The measures proposed in Actions 1, 2, and 3 will strengthen the position of the community entity slightly; however, these measures are unlikely to substantially change the negotiating position of a right holder, particularly if the PQS holder is determined to undermine that negotiating position. More realistically, the right (as modified by proposed actions 1, 2, and 3) will very slightly increase the community entities' (and the communities that they represent) negotiating leverage and political leverage, in the event that a PQS holder wishes (or attempts) to move IPQ use from a community to the detriment of the community. The second and third actions could increase administrative costs disproportionately to any benefit.

The fourth action is intended to provide community entities with a stronger connection to processing privileges derived from historic processing in the communities they represent by requiring entity approval for the movement of that processing outside of the community. Although the action would clearly strengthen community interests, it could have some unintended consequences, by preventing complete harvest of allocations or limiting flexibility to address emergencies.

The fifth action will improve information available to NOAA Fisheries, the public, and right holders for determining the status and effects of rights. This information could be particularly beneficial to right holders for protecting their interests and ensuring that those interests can be asserted in the most effective manner.

## **2.4.7 Net benefits to the Nation**

The actions proposed in this amendment package are largely intended to assist communities in maintaining historic processing interests in, and revenues from, the crab fisheries. The effects of the first three and the fifth actions will be a slight strengthening of the right of first refusal held by community entities. This change could impose slight efficiency losses on PQS holders and buyers and could impose administrative costs that exceed any community benefit. Overall, the effect on net benefits to the Nation of the first three and fifth actions is expected to be minimal.

The fourth action would require a community's representative entity to consent to the movement of IPQ processing outside the community from which the underlying PQS originated. The overall effect of this action on net benefits is difficult to predict with any certainty. If a substantial gain in efficiency could be realized through permanent (or long term) movement of processing from a community, and the entity refuses to allow that movement, an ongoing loss of net benefits would arise. Losses of net benefits could also be substantial, if an emergency prevents landing of a large amount of crab outside of a community because that community refuses to consent to the movement of processing to another location, effectively stranding the year's deliveries of IPQ designated for the community. Such a situation could arise, if a community maintains that it should be compensated for its losses from the movement and the IPQ holder refuses. More routinely, if community representatives consent to the movement of small amounts of IPQ to facilitate full harvest of allocations at the year's end, any loss of net benefits could be quite small (or zero). Depending on the circumstances, the loss of net benefits to the Nation under this action could be quite large (e.g., a substantial portion of the net benefits that would be derive from deliveries to any community in a given year) or near zero.

## **3 REGULATORY FLEXIBILITY ANALYSIS**

### **3.1 Introduction**

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

The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts, while still achieving the stated objective of the action. When an agency publishes a proposed rule, it must either, (1) "certify" that the action will not have a significant adverse effect on a substantial number of small entities, and support such a certification declaration with a "factual basis", demonstrating this outcome, or, (2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities.

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

The IRFA must contain:

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

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

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

### **3.1.1 Definition of a Small Entity**

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

Small businesses: Section 601(3) of the RFA defines a “small business” as having the same meaning as a “small business concern,” which is defined under Section 3 of the Small Business Act. A “small business” or “small business concern” includes any firm that is independently owned and operated and not dominate in its field of operation. The U.S. Small Business Administration (SBA) has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business “involved in fish harvesting” is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates), and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide.

A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates) and employs 500 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

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

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

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

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

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

### **3.2 A description of the reasons why action by the agency is being considered**

The Council developed the following purpose and need statement defining its rationale for considering this action:

*The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.*

*To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning **between 20 percent and 50 percent of the PQS<sup>41</sup>** in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.*

### **3.3 The objectives of, and the legal basis for, the proposed rule**

Under the current regulatory structure, Bering Sea/Aleutian Islands crab resources are managed by NOAA Fisheries and the State of Alaska, under an FMP. The objective of this action is to clarify and strengthen the opportunity of entities holding rights of first refusals on transactions that include PQS to more effectively exercise those rights. The authority for this action and the FMP are contained in the Magnuson-Stevens Act, as amended by the Consolidated Appropriations Act of 2004.

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

This action directly regulates holders of PQS and community entities holding the rights of first refusal.

Estimates of small entities holding PQS are based on the number of employees of PQS holding entities. Currently, 21 entities hold PQS subject (now or previously) to rights of first refusal. Estimates of large entities were made, based on available records of employment (see Department of Labor and Workforce Development, 2008) and analysts’ knowledge of foreign ownership of processing companies. Of these 21 entities, 10 are estimated to be large entities, leaving 11 judged to be small entities.

Five community entities hold rights of first refusal on behalf of eight communities. The community entities are directly regulated by the first three actions. The last action directly regulates the 8 communities.

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<sup>41</sup> The Council should consider revising this clause to state that community organizations “hold substantial portions of the PQS in each rationalized fishery.” Although it is possible that organization holdings reach these levels in some fisheries, in some cases holdings are indirect. In addition, some holdings of PQS on which a community entity has never held a right of first refusal. Given these circumstances, the statement as written may not be fully accurate or may be misconstrued by readers. A more general statement may address these concerns.



### **3.5 A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule**

The reporting, record keeping, and other compliance requirements will be increased under the proposed actions. Under Action 1, no change in recording keeping will arise, as the action only changes the time periods for exercise of the right of first refusal and performance under the contract. Under Action 2, reporting, record keeping, and compliance requirements will be increased, as PQS holders could be required to maintain additional contracts establishing rights of first refusal. Action 3 would allow community entities to initiate an appraisal process that is intended to make the right of first refusal more effective. Although this is a privately administered process, it could prove costly and administratively complex. Under Action 4, community consent would be required for an IPQ holder to move processing out of the community from which the underlying PQS originated. Although providing consent would be fully at the discretion of the community, any community that provides consent would be required to maintain current records of persons authorized to consent to the movement of IPQ and those persons, on behalf of the community, would be required to prepare any consents and report those consents to NOAA Fisheries. No additional recordkeeping would be required of IPQ holders, but those holders would have an interest in tracking any consents under which they would move processing from a community. Under Action 5, PQS holders and recipients would be required to provide certifications concerning the status rights of first refusal at the time of transfers, and notices concerning transfers, use of IPQ, and the lapse of rights of first refusal.

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

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

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

[To be added]

## **4 NATIONAL STANDARDS & FISHERY IMPACT STATEMENT**

### **4.1 National Standards**

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

#### **National Standard 1**

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

The proposed alternatives would have no effect on any current management measure's prevention of overfishing. Under the fourth action, the ability of the fleet to achieve optimum yield could be reduced, if IFQ are stranded because the IPQ holder cannot reach an agreement with a community to allow landings

to occur outside of the community and the IPQ holder elects or is unable to take those landings in the community.

### **National Standard 2**

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

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

### **National Standard 3**

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

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

### **National Standard 4**

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

The proposed alternatives would treat all participants the same, regardless of their state of residence. The proposed change would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program by ensuring that community interests are adequately protected. The action will not contribute to an entity acquiring an excessive share of privileges.

### **National Standard 5**

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

This action considers efficiency in utilization of the resource balancing that efficiency against community interests in establishing the rights of first refusal or expanded community protection under the fourth action. The action is intended to ensure that community social and cultural interests are adequately protected.

### **National Standard 6**

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

The actions do not affect the annual allocation process. To the extent that the availability of resources are affected, the reduction is necessitated by the protections to communities arising from this action.

### **National Standard 7**

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

This action does not duplicate any other measure and would not add costs to beyond those necessary to implement the protections intended by the action.

### **National Standard 8**

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

This action is intended to minimize potential adverse effects on communities and ensure sustained community participation in the fisheries by ensuring that historically dependent communities are adequately protected by the measures included in the rationalization program.

### **National Standard 9**

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

This action has no effect on bycatch or discard mortality.

### **National Standard 10**

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

The first three actions considered have not effect on safety of human life at sea. The fourth action could create some safety concerns that might arise, if making a landing in a particularly community created a risk and that community and the matched IPQ holder were unable to reach an agreement under which the community would consent to use of the IPQ outside the community.

## **4.2 Section 303(a)(9) – Fisheries Impact Statement**

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

## 5 REFERENCES

ADFG (May 8, 2012) Emergency Order 4-S-24-12, Bering Sea Snow Crab Fishery Partial Extension of Eastern Subdistrict.

ADFG (May 14, 2012) Emergency Order No. 4-S-25-12, Bering Sea Snow Crab Season Extended.

EDAW (2004) Social Impact Assessment of the Environmental Impact Statement for Bering Sea and Aleutian Islands Crab Fisheries – Overview and Community Profiles, EDAW, San Diego, California.

EDAW (2005) Comprehensive Baseline Commercial Fishing Community Profiles: Unalaska, Akutan, King Cove, and Kodiak, Alaska, EDAW, San Diego, California.

National Marine Fisheries Service (October 24, 2006) Application for transfer of QS/IFQ, PQS/IPQ, OMB No. 0648-0154 (available at <http://www.fakr.noaa.gov/ram/default.htm>).

North Pacific Fishery Management Council/AECOM (November 2010) Five-Year Review of the Crab Rationalization Management Program for Bering Sea and Aleutian Islands Crab Fisheries.

North Pacific Fishery Management Council (June 2004) Motion of the Council for BSAI Crab Rationalization, June 10, 2002, updated through June 9, 2004.

North Pacific Fishery Management Council/EDAW (November 2008) Three-Year Review of the Crab Rationalization Management Program for Bering Sea and Aleutian Islands Crab Fisheries.

North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004a) Environmental Impact Statement, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries.

North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004b) Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries.

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