

Discussion paper on arbitration system  
Bering Sea and Aleutian Islands crab fisheries  
October 2012

At its December 2011 meeting, the Council received a staff report reviewing the first 5 years of fishing under the Bering Sea and Aleutian Islands crab rationalization program. After receiving that report and public testimony, the Council chose to further consider some aspects of the program, including certain provisions in the arbitration system. The Council specifically requested staff to prepare a discussion paper examining three aspects of the arbitration program: 1) examine the lengthy season approach to arbitration and the dynamics of arbitration proceedings under that approach,(including the timing of proceedings and the effects of the lengthy season approach on the relative position of the parties in arbitration), 2) the potential for publishing arbitration findings, and 3) the potential for allowing either side to initiate arbitration proceedings. This paper examines the three issues, as requested by the Council.

## Background

Under the crab program, historical harvest participants were issued quota shares. These quota shares (QS), in turn, yield annual allocations of individual fishing quota (IFQ), which are a privilege to harvest a specific poundage of crab from a fishery. Quota shares issued based on catcher vessel history yield two types of IFQ. 90 percent of the catcher vessel owner IFQ are issued as Class A IFQ, which must be delivered to a holder of individual processing quota (IPQ), are issued. The remaining 10 percent of catcher vessel owner IFQ are issued as Class B IFQ, which may be delivered to any processor.<sup>1</sup> Historical processors in the crab fisheries were allocated processor quota shares (PQS) under the program. These processor quota shares annually yield individual processing quota, which are a privilege to receive a specific poundage of crab landings made with Class A IFQ. The total issuances of Class A IFQ and IPQ are the same, creating a one-to-one correspondence between pounds of Class A IFQ and pounds of IPQ.

In the development of the program, harvesters requested that the Council consider binding arbitration as a mechanism to resolve ex-vessel price disputes between harvesters and processors. Prior to the program, harvesters often negotiated prices collectively at the beginning of each season, delaying fishing after the opening of the season until an acceptable price was offered or promising additional deliveries to the processors that offered price premiums. In a fishery that allocates both harvesting and processing privileges, these inducements are no longer feasible. The arbitration system is intended to provide a method of determining a fair price for sales of crab in the fishery.

To develop the arbitration system, the Council appointed a workgroup of harvesting and processing representatives. The group identified the following purpose and need statement to guide their discussions:

Issuing harvesting and processing quota raised concerns regarding changes in bargaining power between the harvesting and processing sectors in ex-vessel price formation. Binding arbitration is a mechanism intended to address that issue, and to help achieve the goals articulated in the North Pacific Council's Crab Rationalization Problem Statement (see Appendix A to this discussion paper).

As reflected in that workgroup's statement, maintaining the balance of bargaining power in price setting under the new share structure was the committee's primary concern. The Council purpose and need statement indirectly identifies additional objectives for the arbitration system, including the intention to

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<sup>1</sup> Holders of catcher vessel QS that holder PQS, or are affiliated with a PQS holder, receive have Class A IFQ to match to IPQ that are yielded by those PQS prior to receiving any Class B IFQ.

develop a rationalization program that "maintains healthy harvesting and processing sectors" and "achiev[ing] equity between the harvesting and processing sectors, including healthy, stable and competitive markets."

The arbitration system serves several important purposes in the program, including dissemination of market information to facilitate negotiations, the coordination of matching Class A IFQ held by harvesters to IPQ held by processors, and a binding arbitration process to resolve terms of delivery. The arbitration process begins with the two sectors (harvesters and processors) jointly selecting a "market analyst," who produces a market report, a "formula arbitrator," who develops a price formula specifying an ex vessel price as a portion of the first wholesale price, and a pool of "contract arbitrators," who preside over any binding arbitration proceedings. Neither the market report nor the formula price has any binding effect. Rather, they are intended to provide baseline information concerning the market and a signal of a reasonable price.

Matching of Class A IFQ with IPQ is facilitated through a process of share commitments and dissemination of information concerning available shares. Although this share matching process may aid in establishing commitments to deliver and receive Class A IFQ landings, the terms of those transactions may be disputed (i.e., the commitments need not define the terms of the delivery). An IFQ holder that is not able to resolve all terms of delivery with a processor to whom it has committed deliveries may unilaterally initiate an arbitration proceeding. IPQ holders are not authorized to initiate a binding arbitration proceeding. Once a proceeding is initiated, harvesters that are party to the proceeding select an arbitrator to preside over the specific proceeding from the pool of arbitrators jointly selected earlier. The window for initiating arbitration is 10 days long, beginning 5 days after the allocation of IFQ and IPQ. Once an arbitration proceeding is initiated with an IPQ holder, any holder of IFQ that has committed shares to that IPQ holder may join the arbitration proceeding. This ability to join is critical because the system limits each processor to a single arbitration proceeding. A last opportunity to make use of arbitration is available for harvesters that choose not to join a proceeding. After arbitration is completed, any holder of uncommitted IFQ can bind the IPQ holder to the terms of the proceeding by committing deliveries to the IPQ holder.

Binding arbitration proceedings are conducted on a "last best offer" basis. Under this system, each party to the proceeding submits a "last best offer". The role of the arbitrator is to select one offer from each of the two competing offers. In binding arbitration involving two or more harvesters, each harvester may either submit an independent offer or join a collective offer (as part of a Fishery Collective Marketing Act (FCMA) cooperative). The processor submits a single offer. For each harvester offer, the arbitrator's role is to select either that harvester's offer or the processor's offer (which applies to all harvesters).

Since the full effects of the program on the timing of fishing and marketing activities were not predictable, the arbitration system allows participants to modify the arbitration timeline. This "lengthy season" approach allows IFQ and IPQ holders that have committed deliveries to negotiate a modified schedule for arbitration. If the parties are unable to agree on the lengthy season approach, they may arbitrate whether to adopt that approach and the timing of the proceeding. Agreements to use the lengthy season approach to arbitration must be entered into prior to the opening of the applicable program fishery.

To ensure predictability and fairness, the arbitration system sets forth standards to be followed by formula arbitrators and contract arbitrators. Although different standards apply to the formula arbitrator and the contract arbitrator, the differences between the standards are very limited making the standards substantively the same. The regulations state that both the non-binding price formula and contract arbitrator's decision must "(A) Be based on the historical distribution of first wholesale revenues between

fishermen and processors in the aggregate based on arm's length first wholesale prices and ex-vessel prices, taking into consideration the size of the harvest in each year; and (B) Establish a price that preserves the historical division of revenues in the fishery while considering" several listed factors. The formula arbitrator is required to consider the "highest arbitrated price" from the previous season. To ensure that the price is generally applicable, it must apply to at least 7 percent of the IPQ in the fishery. In turn, the contract arbitrator is required to consider the non-binding price formula produced by the formula arbitrator in deciding a contract in a last best offer proceeding. These two requirements effectively create a feedback between the non-binding arbitration of the formula arbitrator and the binding arbitration of the contract arbitrator. By providing the formula arbitrator with the submissions from the binding proceedings, the formula arbitrator can provide some guidance on factors at issue in the prior year's binding proceedings. Less structured than a formal record of opinion from a binding process, this informal feedback is intended to create a flexible system under which the application of the standard is both adaptive and predictable.

Both formula and contract arbitrators are instructed to consider any relevant information presented by the parties. In this context, the standards appear to direct the arbitrators to establish a price that preserves the historical division of first wholesale revenues, while at the same time allowing them to consider other relevant information, including information relevant to the listed considerations.

### ***Share matching and the initiation of binding arbitration***

A critical aspect of the program is the process by which Class A IFQ/IPQ are matched and binding arbitration proceedings are initiated. The one-to-one relationship between Class A IFQ and IPQ raises the importance of making available information concerning uncommitted shares and establishing an efficient system for matching those shares and initiating arbitration, in the event a negotiated settlement of delivery terms cannot be reached.

The system of negotiated and unilateral matching of shares is intended to facilitate the orderly commitment of Class A IFQ deliveries to processors holding IPQ. The process for initiating a binding arbitration proceeding is coordinated with share matching. The regulatory process for matching Class A IFQ to IPQ begins on the issuance of those shares. For the first 5 days after shares are received, holders of Class A IFQ can, by negotiated agreement, commit their shares to holders of unused IPQ. A commitment need not settle all terms of delivery, but prevents either share holder from committing their shares to a different person. After this period of negotiated commitments, holders of Class A IFQ may unilaterally commit their shares to the holder of uncommitted IPQ. In addition, at any time during the first 10 days after the period of negotiated commitments, a holder of Class A IFQ that has committed those shares to an IPQ holder may unilaterally initiate an arbitration proceeding to settle outstanding terms of delivery. This structure, under which a harvester may unilaterally commit deliveries and initiate arbitration, effectively allows a Class A IFQ holder to compel an IPQ holder to accept deliveries at the arbitrated price. IPQ holders cannot either compel an IFQ holder to commit to deliveries or initiate arbitration.

### ***The lengthy season approach***

The arbitration workgroup recognized that the brief, prescriptive, preseason arbitration timeline may not be conducive to price settlements. To allow for flexibility, the workgroup developed an alternative approach to arbitration. Under the "lengthy season approach", the parties may agree to delay any arbitration proceeding until a specific time during the season. The lengthy season approach must be adopted prior to the season opening (which under the current timelines for some fisheries occurs prior to the end of the period for initiating arbitration). If the parties disagree on whether to adopt the lengthy season approach, the IFQ holder may choose to arbitrate either of those issues. Although not directly stated in the regulation, as a part of this arbitration, the date of the arbitration would likely be decided, as

that is the most critical aspect of any lengthy season agreement. Since the timeline for initiating arbitration and the timeline for establishing a lengthy season agreement differ, the ability of a IFQ holder to access arbitration is not consistently timed. If IFQ and IPQ are issued fewer than 15 days prior to a season, the end of the period during which an IFQ holder may enter (or arbitrate) a lengthy season agreement will expire prior to the end of the period for initiation of arbitration. If the share issuance occurs more than 15 days prior to the season opening the period for initiating arbitration will lapse prior to the period for entering (or arbitrating) lengthy season agreements expiring.

Table 1 shows the compressed time frame under which share holders are required to either negotiate terms of deliveries or arbitrate those terms under the current TAC setting schedule.<sup>2</sup> Within this time frame, harvesters and processors must match shares and either settle terms of delivery for those landings or commence arbitration for all Class A IFQ and IPQ in the two primary fisheries (the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries) and any open small secondary fisheries (which may include the Western and Eastern Bering Sea *C. bairdi* fisheries and the St. Matthew Island blue king crab and Pribilof red and blue king crab fisheries).<sup>3</sup> In considering these time pressures, it should be borne in mind that most of the fishing and processing activity in the king crab fisheries occurs in late October and November. Consequently, not only must participants concern themselves with share matching and negotiations, but they also must prepare facilities, vessels, gear, processing lines and position vessels and crews for those fisheries.

**Table 1 Schedule for share matching and arbitration (2011-2012).**

Fishery	TAC Announcement	IFQ/IPQ Issuance/Start of negotiated commitments	End of negotiated commitments/Start of initiation of arbitration actions	Season opening - End of period to agree to lengthy season agreement	End of arbitration initiation period
Bristol Bay red king crab	October 3	October 6	October 11	October 15	October 21
Bering Sea <i>C. opilio</i>	October 5	October 6	October 11	October 15	October 21
St. Matthew Island blue king crab	October 3	October 6	October 11	October 15	October 21
Aleutian Islands golden king crab	July 15	August 10	August 15	August 15	August 25

Source: ADF&G TAC and closure announcements; RAM website.

### **Process for binding arbitration**

This section describes the process used once an IFQ holder has initiated a binding arbitration proceeding. The first step in that process occurs simultaneously with the initiation of the arbitration proceeding. At that time, the IFQ holder that initiated the proceeding selects a contract arbitrator to preside over the arbitration from the pool of jointly selected contract arbitrators.

The regulation provides that the arbitrator should meet with the participants as soon as possible after the arbitration is initiated to schedule the proceeding (50 CFR 680.20(h)(3)(vii)). In addition, the regulation directs the contract arbitrator to meet with the parties to determine the terms that must be included in the last best offer submissions, which may be collectively submitted by harvesters that are members of an FCMA cooperative (50 CFR 680.20(h)(3)(viii) and (xi)).<sup>4</sup> The arbitrator is limited to selecting from the

<sup>2</sup> It should be noted that due date for the market report and formula in the golden king crab fisheries will be moved to 30 days prior to the season opening under an amendment that has yet to be implemented.

<sup>3</sup> The Bering Sea *C. bairdi* fishery is divided into two fisheries, one east of 166° W longitude (the Eastern Bering Sea *C. bairdi* fishery) and one west of 166° W longitude (the Western Bering Sea *C. bairdi* fishery).

<sup>4</sup> The regulation identifies several price structures that may be included in the terms of last best offers (see 80 CFR 680.20(h)(3)(viii)). The rule also refers to the last best offers as defining the “terms of delivery” (see 80 CFR

two last best offers (50 CFR 680.20(h)(3)(viii) and (xi)). The arbitrator's finding must be delivered to the parties within 5 days of submission of the offers (or within 10 days of submission, if the arbitration takes place at least 15 days prior to the season opening, which is an impossibility under the current timelines) (50 CFR 680.20(h)(3)(xi)). Beyond these specific requirements, the arbitration procedure is undefined by the regulation. In development of the arbitration system, the Council sought to provide industry with a flexible system that could be efficiently administered by participants (through the arbitration organizations who represent them). The Council reinforced this principle in a recent action to amend the regulations to specifically provide the arbitration administrators (i.e., arbitration organizations, arbitrators, and third party data providers) with the authority to adopt procedures and make administrative decisions in addition to those specified in the regulations, provided those procedures and decisions are not inconsistent with any regulations. With the exception of quality and performance disputes, which may be arbitrated, participants in the fishery are expected to seek remedies only through civil law. Furthermore, the regulations do not provide a process for appealing an arbitration decision.

### ***Contract Arbitration proceedings to date***

During the first year of the program (2005/6), two binding arbitration proceedings occurred. Both concerned deliveries in the Bering Sea *C. opilio* fishery, with one proceeding also resolving terms for landings in the Bering Sea *C. bairdi* fishery. In the second year of the program (2006/7), three arbitration proceedings were brought to resolve terms for landings in the Bering Sea *C. opilio*, Bering Sea *C. bairdi* and Bristol Bay red king crab fisheries. In the third and fourth years of the program (2007/8 and 2008/9), no proceedings were brought. In the fifth year (2009/10), three proceedings were brought, two in the Western Aleutian Island golden king crab fishery and one in the Bering Sea *C. opilio* fishery. In the sixth year (2010/11), a single arbitration occurred in the Western Aleutian Islands golden king crab fishery. In the most recent season (2011/2012), a single price has yet to be settled and may yet be arbitrated. Results of arbitration proceedings cannot be reported, but it can be reported that harvesters have prevailed in most (but not all) arbitration proceedings concerning ex vessel prices.

In all the proceedings, harvesters were represented by the Inter-Cooperative Exchange (ICE), an FCMA cooperative whose members hold of a large majority of the IFQ eligible for arbitration. While anti-trust law allows IFQ holders that are members of an FCMA cooperative (such as the Inter-Cooperative Exchange) to negotiate prices collectively, processors participating in arbitration must act independently.<sup>5</sup> Consequently, the Inter-Cooperative Exchange has access to information obtained from negotiations with each individual processor to which its members delivery crab. The result is that the Inter-Cooperative Exchange is likely to have more comprehensive information about competing processors' activities and first wholesale prices than the processor with whom it is negotiating. Costs of acquiring information and negotiation are also reduced by consolidation of this activity in a single entity. It is likely that most

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680.20(h)(3)(ix)). This statement that the last best offers define the terms of delivery, together with the breadth of factors that must be considered under the standard, clearly imply that any and all terms of delivery may be specified in an offer and decided in an arbitration proceeding.

<sup>5</sup> Under the rationalization program, IFQ holders may form "harvest cooperatives" that serve the exclusive purpose of coordinating catch of the allocations of their members. Under antitrust law, harvesters that intend to negotiate ex vessel prices collectively must comply with the requirements of the FCMA. Because of their different purposes, the limitations on and requirements for forming cooperatives under the FCMA differ from those of the rationalization program. For the first four years of the program, the Inter-Cooperative Exchange acted exclusively as a marketing and price negotiating entity for several member cooperatives. In the fifth year of the program, the Inter-Cooperative Exchange modified its structure, becoming a "harvest cooperative" under the program, as well as an FCMA cooperative for price negotiation purposes. This new structure allows the Inter-Cooperative Exchange to directly administer the IFQ harvests of its members (including any intra-cooperative share transfers).

harvesters have more information available to them through this coordinated system than they might have under a less structured program (i.e., one that did not include such an arbitration system).

In the first six years of the program, all participants who have used the binding arbitration process have relied on the lengthy season approach, whereby arbitration proceedings are delayed until a time during the crab fishing year. To date, all proceedings concerning pricing and delivery terms have occurred at the earliest in the late spring or summer, more than 6 months after the original deadline for initiation of arbitration proceedings in these fisheries. In two cases, proceedings were delayed well into the following season. The parties to one of those disputes settled their disagreement, while the other used the arbitration system to resolve the dispute. To date, arbitration has been used twice to resolve procedural issues; one of which resolved the timing of a lengthy season proceeding.

The use of the lengthy season approach has relieved the time pressure under the standard arbitration timeline and has allowed participants in both sectors to negotiate with more complete market information. Some processors, however, contend lengthy season arbitration works to their disadvantage. The reliance on the lengthy season approach (particularly, if arbitration is delayed long beyond the sale of their product) can prevent a processor from timely reconciling its books. In addition, processors also contend that harvester reliance on the lengthy season approach produces an unfair competitive advantage in arbitration proceedings by allowing the Inter-Cooperative Exchange to gather product price information from across the fishery, which can then be used selectively to induce processors that performed poorly in the product market to pay a higher price. Harvesters contend that this dynamic is important to ensure that processors aggressively pursue high prices in the product market. The Inter-Cooperative Exchange may gain an advantage (particularly in a rising market) by delaying proceedings until sales information is available from several processors, which can then be selectively used in an arbitration proceeding. In some instances, however, a processor may prefer to delay a proceeding until its product is sold, thereby knowing its net return on any offer in arbitration.

### **Processor initiation of arbitration proceedings and lengthy season arbitration**

This section consolidates the discussions of the initiation of arbitration proceedings and lengthy season arbitration. Since the prescribed arbitration process and lengthy season arbitration are two alternatives for arbitrating price, interactive effects arise from modification of either of these provisions.

Some PQS holders assert that the current system favors IFQ holders by allowing only IFQ holders to initiate arbitration. According to this argument, providing IFQ holders with the unilateral authority to initiate arbitration allows IFQ holders to control the timing of any arbitration proceeding and influence negotiations. An IPQ holder may be reluctant to assert a strong position or counter-position for fear of inducing an IFQ holder to initiate a proceeding. The extent of any advantage gained by IFQ holders, however, is affected by both the limited time for initiating arbitration and the option of using lengthy season agreements to postpone arbitration proceedings. To date, no arbitration proceedings have relied on the standard timeline for initiating arbitration. In other words, IFQ holders have never used the unilateral authority for initiating arbitration under the prescribed timeline, instead using lengthy season agreements to determine arbitration timing. To influence the timing of arbitration, IPQ holders could resist lengthy season agreements in an attempt to compel the IFQ holder to initiate an arbitration proceeding; however, whether this tactic would result in the IFQ holder initiating a proceeding is uncertain. The rules for arbitration allow an IFQ holder to arbitrate whether a lengthy season arbitration should be undertaken. It is possible that an IFQ holder would request the arbiter to allow for a lengthy season proceeding, rather than force the IPQ holder to immediately arbitrate the price. The arbiter would need to decide whether establishing a price under the prescribed timeline is more equitable than deciding a price at a later date in a lengthy season arbitration proceeding. The outcome would depend on the circumstances and the

arguments advanced by the parties. The arbiter would likely assess the benefits of establishing a price with certainty at the start of the season relative to the benefits of having additional information for establishing the price later in the season. Establishing a dollar price with certainty could be argued to be beneficial, as it would create an incentive for the processor to pursue the highest return from products, as the processor would directly benefit from any marginal sales price increase. Harvesters would be provided price certainty, but at the cost of its loss of any bonus that might be paid, if the processor achieves greater than anticipated success in the product market. Under the arbitration standard, as applied to date, IPQ holders have shared the benefits associated with improved returns with harvesters based largely on the historical division of first wholesale revenues in the fishery. The result has been that IPQ holders have less incentive to pursue the greatest total return from sales (as a portion of those returns are shared with IFQ holders). Although setting the price preseason may alter incentives, the arbiter may be persuaded to adopt lengthy season arbitration to allow for more price information to come available. Using more prices from actual sales could allow the arbiter to establish a price that more closely reflects the historical division of first wholesale revenues. Given that no processor has attempted to compel an IFQ holder to initiate a proceeding under the prescribed schedule, the response of an arbiter to these arguments is largely speculative.

In considering allowing IPQ holders to initiate arbitration, additional factors, including the interactions with other aspects of the program are important. Perhaps most relevant, the system allows for only a single arbitration proceeding with each IPQ holder. Allowing an IPQ holder the opportunity to initiate arbitration could provide a shift in leverage, by allowing the IPQ holder to dictate that the proceeding would occur under the prescribed timeline (rather than as a lengthy season arbitration). IFQ holders would then be unable to initiate a second arbitration at a different time.<sup>6</sup> Currently, IPQ holders could resist lengthy season arbitration, but with the authority to initiate an arbitration proceeding, the IPQ holder's ability to alter the timing of proceedings could be changed substantially.

As noted above, processors have concerns that delaying of arbitration to a time during or after the season under the lengthy season approach can change the negotiating positions of the parties, particularly with the current cooperative structure of the harvest sector). When proceedings are delayed, additional price information is available to IFQ holders (through monitoring crab markets and negotiations of the FCMA cooperative with several processors) that can be used in the negotiation and arbitration with an IPQ holder. While some processors may derive an advantage from delays from waiting until after their product sales are final, the business operations of others are disrupted, as the delayed arbitration prevents parties from finalizing their accounts. While ensuring that reasonable market information is available is a legitimate concern of both parties, delays can allow IFQ holders (particularly those in a single cooperative) to amass relatively comprehensive market information from all processors through their FCMA cooperative. Given the limits on IPQ holders attaining complete access to this information, extended delays may be detrimental (and may be perceived to be unfair) to IPQ holders. Under the current structure, IPQ holders could contest long delays of arbitration proceedings under the lengthy season approach through an arbiter. To date, in only one such delay has been contested. Given the lack of contested delays under the lengthy season approach, it is unclear the extent to which IPQ holders have been unfairly disadvantaged.

### **Release of arbitration decisions**

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<sup>6</sup> It is possible that an IFQ holder would respond to the initiation of the proceeding by requesting the arbiter to allow a lengthy season proceeding, instead of the proceeding on the prescribed timeline. Whether an arbiter would determine that a lengthy season proceeding should be permitted (or even whether the arbiter would consider such a request) is uncertain, since the IPQ holder would have already initiated the arbitration proceeding.

Participants in the arbitration system have questioned whether the process for release of arbitration decisions could be improved. Specifically, some participants have requested that arbitration decisions be required to provide the rationale for the decision. Participants have also suggested that release of the decisions to the public could improve information available to participants, which could aid parties in reaching price agreements.

Current rules require the contract arbitrator to release arbitration decisions to the participants on or before the later of: 1) 10 days prior to the season and 2) 5 days after the submission of last best offers by the parties (see 50 CFR 680.20(h)(3)(xi)). No further guidance is provided concerning the contents of any decision (or whether the arbitrator's decision should inform the parties of his rationale). In most cases, the arbitrator has simply informed the parties of the offer selected with no additional information concerning the rationale for the decision, as is common practice in last best offer arbitration.

The rules governing arbitration are administered through contracts among arbitration organizations representing QS holders, PQS holders, IFQ holders, and IPQ holders. These contracts are required to contain certain specific provisions that define the arbitration system (including the provisions setting the time for release of arbitration decisions). Since the system is not fully defined by the rules, the arbitration organizations are also permitted to define other procedures (and decisions concerning the administration of the system), provided those procedures are not inconsistent with any other provisions of the regulations (50 CFR 680.20(i)). Under this authority, the arbitration organizations could, by agreement, direct contract arbitrators to provide additional information concerning the rationale for their decisions, as nothing in the current rule suggests that the arbitrators should not provide a rationale for their decisions.

Current regulations provide for limited release of arbitration decisions beyond parties to the proceeding. Holders of uncommitted Class A IFQ who are not affiliated with any processor are provided with decisions, as the system provides them with the opportunity to 'opt in' to any arbitration decision by committing delivery of their Class A IFQ harvests to the IPQ holder (50 CFR 680.20(e)(2)(iii)(B)(3)). In addition, the formula arborer for the following year is provided with decisions, which may be used in the development of the following year's formula (50 CFR 680.20(g)(2)(ix)). In addition, the regulation includes several prohibitions on the releases of decisions and information from arbitration proceedings (see 50 CFR 680.20(h)(5) and (6), 50 CFR 680.20(e)(2)(iii)(B), and 50 CFR 680.20 (g)(2)(ix)).

The arbitration regulations generally reflect an opinion received by NOAA General Counsel during development of the arbitration system concerning anti-trust issues that might arise. That opinion specifically recommended that the results of arbitration proceedings be provided only to the parties to the proceeding, arbitrators, and holders of uncommitted IFQ that are permitted to opt-in to the arbitration decision. The opinion cautions that access to decision "could influence a harvester's or processor's final offer to the arbitrator in later proceedings or facilitate pricing coordination for other seafood or in future crab seasons."<sup>7</sup> The opinion also states that:

sharing this type of current pricing information...could facilitate illicit price stabilization or even collusion. Moreover, if processors shared the results before all arbitrations were complete, a processor could alter its final offer to the arbitrator and make it closer to the price of the previous arbitrations in a manner similar to what would occur if the processors coordinated on prices.<sup>8</sup>

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<sup>7</sup> Memorandum of Debbie Feinstein, Donna Patterson, Jon Nathan (Arnold & Porter LLP) and Andrew Dick (CRA), NOAA Proposed Crab Arbitration Program, May 18, 2004 at p.5. It should also be noted that throughout the opinion, it is acknowledged that FCMA cooperatives are permitted to share information among members

<sup>8</sup> Memorandum of Feinstein, et al. at p. 34.



The opinion suggests that the release of decisions could lead non-participants to offer prices and final offers in arbitration that reflect arbitration outcomes in a manner similar to price coordination. The opinion concludes stating that:

*because we are unable to determine any procompetitive justification* for providing these entities with the results, we believe that the release of arbitration results should be limited to arbitrators and harvesters who have not committed their shares (*emphasis added*).<sup>9</sup>

In essence, the opinion suggests that a risk of use of the information in decisions for anticompetitive purposes exists and no procompetitive purpose can be determined. If those circumstances are true, prohibiting release of decisions would seem wholly justified; however, some participants in the fishery believe that release of decisions may serve a competitive price setting purpose. These participants assert that arbitration decisions can be used by participants to gauge the reasonableness of price offers under the arbitration standard. They suggest that release of decisions could be delayed until all price settlements for a season are final to reduce the risk of use of a decision for anticompetitive purposes. In the following year, these arbitrated prices could be used by participants in both sectors to gauge the application of the arbitration standard, rather than to set a specific price. Whether these possible benefits overcome the potential for use of the decisions for anticompetitive purposes is not certain. If the Council wishes to pursue a modification that allows for release of arbitration decisions, further justification for releases should be provided from proponents, including a demonstration that the release would serve a procompetitive purpose and that the potential for use of decisions for anticompetitive purposes is minimal. These justifications could be shared with NOAA General Counsel to assess whether a release of decisions could be pursued without raising antitrust concerns.

Any modification of the arbitration system to provide for the release of decisions will need to carefully evaluate the potential for the decisions to be used for anticompetitive purposes. In addition, a procompetitive purpose should be unequivocal. No release should be pursued unless it is clearly established that the risk of anticompetitive behavior is *de minimus* and a procompetitive purpose is clearly established.

## **Conclusion**

This paper addresses three potential modifications to the arbitration system: 1) allowing processors to initiate arbitration proceedings, 2) constraining the timing of lengthy season proceedings, and 3) providing for the release of arbitration decisions. If the Council wishes to pursue any modification of the system, it should proceed with the development of a purpose and need statement and alternatives that specifically define a potential action. Any proposed change in the release of arbitration decisions should also be developed in a manner that provides a procompetitive purpose and limits the potential for the use of decisions for anticompetitive purposes.

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<sup>9</sup> Memorandum of Feinstein, et al. at p. 35.

## Appendix A

### **Bering Sea and Aleutian Islands crab rationalization program purpose and need statement:**

*Vessel owners, processors and coastal communities have all made investments in the crab fisheries, and capacity in these fisheries far exceeds available resources. The BSAI crab stocks have also been highly variable and have suffered significant declines. Although three of these stocks are presently under rebuilding plans, the continuing race for fish frustrates conservation efforts. Additionally, the ability of crab harvesters and processors to diversify into other fisheries is severely limited and the economic viability of the crab industry is in jeopardy. Harvesting and processing capacity has expanded to accommodate highly abbreviated seasons, and presently, significant portions of that capacity operate in an economically inefficient manner or are idle between seasons. Many of the concerns identified by the NPFMC at the beginning of the comprehensive rationalization process in 1992 still exist for the BSAI crab fisheries. Problems facing the fishery include:*

- 1. Resource conservation, utilization and management problems;*
- 2. Bycatch and its' associated mortalities, and potential landing deadloss;*
- 3. Excess harvesting and processing capacity, as well as low economic returns;*
- 4. Lack of economic stability for harvesters, processors and coastal communities; and*
- 5. High levels of occupational loss of life and injury.*

*The problem facing the Council, in the continuing process of comprehensive rationalization, is to develop a management program which slows the race for fish, reduces bycatch and its associated mortalities, provides for conservation to increase the efficacy of crab rebuilding strategies, addresses the social and economic concerns of communities, maintains healthy harvesting and processing sectors and promotes efficiency and safety in the harvesting sector. Any such system should seek to achieve equity between the harvesting and processing sectors, including healthy, stable and competitive markets.*