

FINAL REGULATORY FLEXIBILITY ANALYSIS

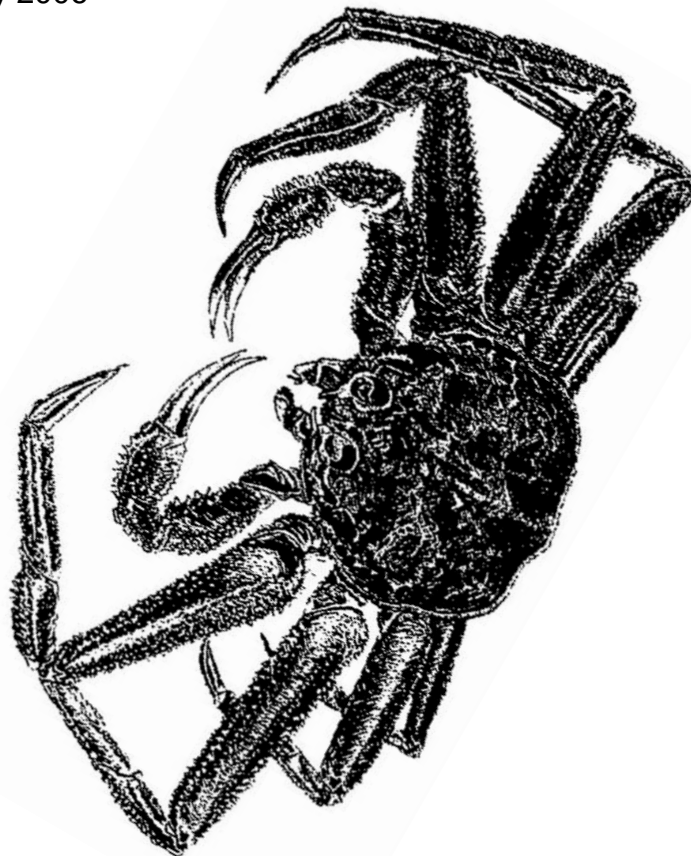
For Amendment 20 to the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crabs.

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Abstract: In January 2004, the U.S. Congress amended Section 313(j) of Magnuson-Stevens Act to mandate the Secretary of Commerce implement the Crab Rationalization Program for the Bering Sea and Aleutian Islands crab fisheries (Program). Under the Program, quota share, processor quota share, individual fishing quota, and individual processing quota are issued for a single Tanner crab (*C. bairdi*) fishery across the entire BSAI management area. This action amends the Program, establishing allocations of harvesting and processing shares for each of the two separate stocks. This FRFA addresses the statutory requirements of the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601-612).

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Introduction

This Final Regulatory Flexibility Analysis (FRFA) evaluates the impacts of the final rule implementing Amendment 20 to the Fishery Management Plan for Bering Sea / Aleutian Islands (BSAI) King and Tanner Crabs (FMP) on small entities.

The proposed rule for Amendment 20 was published in the Federal Register on March 21, 2006 (71 FR 14153). An Initial Regulatory Flexibility Analysis (IRFA) was prepared for the proposed rule, and described in the classifications sections of the preamble to the rule. The public comment period ended on May 5, 2006. No comments were received that specifically addressed the IRFA.

In January 2004, the U.S. Congress amended Section 313(j) of Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to mandate the Secretary of Commerce (Secretary) to implement the Crab Rationalization Program (Program) for the Bering Sea and Aleutian Islands (BSAI) crab fisheries, developed by the North Pacific Fishery Management Council (Council). On March 2, 2005, the Secretary issued regulations to establish the Program (70 FR 10174).

This FRFA meets the statutory requirements of the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 601-612).

The purpose of an FRFA

The RFA, first enacted in 1980, 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 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.

On March 29, 1996, President Clinton signed the SBREFA. Among other things, the new law amended the RFA to allow judicial review of an agency's compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency's violation of the RFA.

In determining the scope, or "universe", of the entities to be considered in an IRFA, NMFS generally includes only those 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, or portion thereof, of the industry (e.g., user group, gear type, geographic area), that segment would be

considered the universe for the purpose of this analysis. NMFS interprets the intent of the RFA to address negative economic impacts, not beneficial impacts, and thus such a focus exists in analyses that are designed to address RFA compliance.

Because, based on all available information, it is not possible to ‘certify’, NMFS has prepared a formal FRFA and included it in this package for Secretarial review.

What is required in an FRFA?

Under 5 U.S.C., Section 604(a) of the RFA, each FRFA is required to contain:

- A succinct statement of the need for, and objectives of, the rule;
- A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- A description of the projected reporting, recordkeeping 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; and
- A description of the steps the agency has taken to minimize any significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

What is a small entity?

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

Small businesses. Section 601(3) of the RFA defines a “small business” as having the same meaning as “small business concern”, which is defined under Section 3 of the Small Business Act. Small business or small business concern includes any firm that is independently owned and operated and not dominant in its field of operation. The 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 firm 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 United States, 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, 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. Finally 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 percent 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 has the power to control less than 50 percent 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 not-for-profit 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.

A succinct statement of the need for, and objectives of, the rule

The objective of the action is to bring Federal and State crab fishery allocation rules into accord. Under the current FMP, management of BSAI crab fisheries is shared with the State of Alaska. Under its FMP authority, the State of Alaska has determined that Bering Sea *C. bairdi* will be managed as two stocks. Federal regulations currently allocate fishing and processing privileges for management of *C. bairdi* as a single stock. The current action is necessary to modify the Federal allocations of fishing and processing privileges, consistent with two stock management of *C. bairdi*.

Public Comments

NMFS published a proposed rule for Amendment 20 on March 21, 2006 (71 FR 14153). NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule, as described in the classifications section of the preamble to the proposed rule. Public comments on the proposed rule and IRFA were accepted through May 5, 2006. NMFS received no public comments on the proposed rule. No changes were made to the final rule from the proposed rule in response to public comments.

A description of, and an estimate of the number of small entities to which the final rule will apply

Fishing under the Program began in August of 2005. Estimates of the number of small harvesting entities under the program are complicated by several factors. First, each eligible captain will receive an allocation of QS under the program. A total of 186 captains are expected to receive preliminary allocations for the 2005-2006 fishery. In addition, 269 allocations of vessel owner shares were made under the program, for a total of 454 allocations in the Bering Sea *C. bairdi* fisheries. Since some persons participated as both vessel owners and captains, and others will receive allocations from the activities of multiple vessels, only 294 unique entities are estimated to receive harvest share allocations.

Since prices under the Program could vary from previous years when the fishery was subject to different management, the gross revenues of participants are also difficult to predict. The best available approximation of crab prices are the market analysis and arbitration reports prepared as a part of the Crab Rationalization Program arbitration system. Estimates of gross revenues for purposes of determining the number of small entities, relied on the low estimates of prices from the arbitration reports. The arbitration report estimated low prices of \$4.53 per pound for Bristol Bay red king crab, \$1.35 for *C. opilio*, \$1.58 for *C. bairdi*, and \$2.27 for Aleutian Islands brown king crab. This analysis relies on these prices, which may be unrealistically low, to avoid underestimating the number of small entities. Applying these prices to the allocations, 7 recipients are estimated to be large entities, and 287 are estimated to be small entities.

Allocations of *C. bairdi* quota under the program were made to 20 processors. Estimates of large entities were made based on available records of employment and analysts' knowledge of foreign

ownership of processing companies. Of these recipients, nine are estimated to be large entities, leaving eleven small entities.

No communities are directly regulated by this action.¹

A description of the projected recordkeeping, reporting, and other compliance requirements of the final rule

The reporting, recordkeeping, and other compliance requirements of the final rule will not change from those of the Program with respect to QS, IFQ, PQS, and IPQ. As such, this action requires no additional reporting, recordkeeping or other compliance requirements.

Description of significant alternatives and description of steps taken to minimize the significant economic impacts on small entities

The Council adopted for analysis the following alternatives for allocating QS and IFQ to harvesters:

- 1) No action, under which IFQ allocations for the *C. bairdi* fishery do not match the two stock management of the fishery.
- 2) The preferred alternative - Make two equivalent allocations of QS (one for each fishery) based on all of a person's *C. bairdi* history during the qualifying years (regardless of where those harvests occurred). This structure would have two QS pools, one for each of the fisheries.
- 3) Make two allocations of QS (one for each fishery) with the allocations based on where harvests occurred. Harvests east of 166° W. longitude would yield an allocation of QS in the fishery east of 166° W. longitude. Harvests west of 166° W. longitude would yield an allocation of QS in the fishery west of 166° W. longitude. This structure would have two QS pools, one for each of the fisheries.

The Council also adopted for analysis the following alternatives for allocating PQS and IPQ to processors:

- 1) No action, under which IPQ allocations for the *C. bairdi* fishery do not match the two stock management of the fishery.
- 2) The preferred alternative - Make two equivalent allocations of PQS (one for each fishery) based equally on a company's qualified Bering Sea *C. opilio* processing history and qualified Bristol Bay red king crab processing history (regardless of where harvests that

¹ Although some aspects of the Crab Rationalization Program regulate communities, the *C. bairdi* fishery allocations are exempt from those provisions.

led to those landings occurred). This alternative would result in two PQS pools, one for each fishery.

- 3) Make one allocation of PQS for the Bering Sea *C. bairdi* fishery based equally on a company's qualified Bering Sea *C. opilio* processing history and qualified Bristol Bay red king crab processing history (regardless of where harvests that led to those landings occurred). This single type of PQS would yield IPQ that can be used for landings from either fishery (i.e., IFQ west of 166° W. longitude or IFQ east of 166° W. longitude). This alternative would result in one PSQ pool that would yield IPQ that could be used in either *C. bairdi* fishery.

These alternatives comprise the suite of “significant alternatives” for purposes of the RFA.

The status quo has inconsistencies in State and Federal management of the *C. bairdi* fishery that make the Federal share allocations inconsistent with the State management of the fishery as two stocks. This lack of coordination between State and Federal management may leave participants uncertain concerning the prosecution of a *C. bairdi* fishery. Yet, since the stock levels are not adequate to support fishing in both areas, this confusion has no implications currently.

The difference in effects of the revised harvester allocation alternatives (Alternatives 2 and 3 for harvesters) on the social and economic environment is primarily distributional. Under Alternative 2 (the preferred alternative) for allocations to harvesters (including captains), an eligible participant will receive an allocation each in both fisheries based on all qualifying catch, regardless of where that catch occurred. Under Alternative 3, a harvester will receive an allocation in each fishery based on historic catch from the area of the fishery. Under Alternative 3, a person's allocation will be skewed toward the area in which the person had greater catches, relative to other participants. The distributional effects under the different allocations, however, depend not only on the size of the allocation to a person in a fishery, but also on whether the fishery opens, and the size of the area TAC.

For processors, the revised allocation alternatives (Alternatives 2 and 3) have operational and efficiency effects. Under Alternative 2 (the preferred alternative), PQS and IPQ pools are created for the two fisheries. Share holders will be able to freely trade shares in the fisheries, to establish long term relationships in each fishery, independently. Under Alternative 3, PQS are allocated that generate annual allocations of IPQ that can be used in either fishery (so the IPQ pool is equal to the sum of the Class A IFQ pool in the two fisheries combined). Since TACs in the fisheries may fluctuate independently, harvesters that do not hold equal percentages of the pools in both fisheries will be unable to establish fixed long-term relationships with a processor for all of their shares. Instead these participants will need to modify their relationships if TACs change independently in the respective fisheries. This restructuring of relationships could reduce efficiency in the fisheries by adding to transaction costs of participants. Small entities may be more sensitive to these added costs than larger entities that typically have greater share holdings, which may provide greater leverage in negotiating relationships and also provide a greater base over which to distribute the additional costs.

The choice of processing alternative could have some effect on community distribution of processing activity. Initial allocations under the different alternatives are equivalent. Annual allocations of IPQ, however, could result in some differences in community effects, depending on trading that might be undertaken under the different alternatives. Under the first revised processor allocation alternative (Alternative 2, which creates distinct processing shares for the two fisheries), some processors may choose to consolidate holdings in one fishery or the other. For

example, processors in the Pribilofs may choose to develop west share holdings, as that fishery is closer to the Pribilofs. The inability to consolidate PQS holdings in a single fishery could have impacts for some communities that have locational advantages in one fishery. The specific community impacts of this effect cannot be predicted. Because communities are not directly regulated by any of the proposed alternatives, any indirect economic impacts are not relevant under the RFA, although they have been addressed fully in the RIR.

Although none of the alternatives is believed to have the potential to result in significant adverse economic impacts on a substantial number of small entities, Processor Alternative 2 appears to minimize the potential negative impacts that could arise, relative to Processor Alternative 3. The potential adverse impacts on directly regulated small entities of the Harvester alternatives cannot be distinguished.

No additional significant alternatives to the rule exist that accomplish the stated objectives, that are consistent with applicable statutes, and that would minimize the economic impact of the proposed rule on small entities. No significant adverse effects are shown for this action, therefore, no additional steps were taken to minimize the significant economic impacts on small entities.

List of Preparers and Persons Consulted

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