

FINAL REGULATORY FLEXIBILITY ANALYSIS

For Amendment 21 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 Fishery Conservation and Management Act to mandate the Secretary of Commerce implement the Crab Rationalization Program (Program) for the Bering Sea and Aleutian Islands crab fisheries. The arbitration system is one component of the Program. Under the arbitration system, harvesters that are not affiliated with a processor through ownership or control linkages are permitted to unilaterally commit delivery of harvests from Class A individual fishing quota (IFQ) to a processor with available individual processing quota (IPQ). Once committed, the IFQ holder can initiate a binding arbitration proceeding if the parties are unable to agree to the terms of delivery. This action links the timing for initiating an arbitration proceeding to the issuance of IFQ and IPQ, providing participants with a reasonable and reliable opportunity to use the arbitration system. 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 21 to the Fishery Management Plan for Bering Sea / Aleutian Islands King and Tanner Crabs (FMP) on small entities. This action revises the FMP and regulations to link the timing for share matching and initiating an arbitration proceeding to the issuance of individual fishing quota (IFQ) and individual processing quota (IPQ), instead of to the date of the first crab fishing season. This change provides IFQ and IPQ holders with a reasonable and reliable opportunity to use the arbitration system under the Crab Rationalization Program (Program). Under this final rule, arbitration is required to be initiated between five days and 15 days after issuance of IFQ and IPQ. This provides a 10-day period for arbitration initiation following a five-day period for harvesters and processors to assess their quota holdings and finalize any voluntary agreements. This modification allows IFQ holders to petition the arbitrator to have the terms of delivery established before or early in the season, providing additional certainty on which to base operational decisions. This timing of arbitration is consistent with the timing of the arbitration outlined in the Program.

The proposed rule for Amendment 21 was published in the Federal Register on April 20, 2006 (71 FR 20378). An Initial Regulatory Flexibility Analysis (IRFA) was prepared for the proposed rule, and described in the classifications sections of the preamble to the proposed rule. The public comment period ended on June 5, 2006. No comments were received that addressed the IRFA.

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 an FRFA, 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 and considered by the agency affecting 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 provide participants with a reasonable and reliable opportunity to fully use the arbitration system by linking the timing for initiating share matching and a binding arbitration proceeding to the issuance of IFQ and IPQ. This action establishes the timing for share matching and initiation of binding arbitration based on the issuance of IFQ and IPQ, including a five-day assessment period for negotiated commitments.

Public Comments

NMFS published a proposed rule for Amendment 21 on April 20, 2006 (71 FR 20378). NMFS prepared an 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 June 5, 2006. NMFS received no public comments on the IRFA. NMFS received two letters and four unique comments on Amendment 21 and the proposed rule. Some minor clarifications were made in the final rule based on public comment. These changes do not alter the intent or effect of the rule.

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

Fishing under the Crab Rationalization Program began in the August of 2005. Estimates of the number of small harvesting entities participating under the Program are complicated by several factors. First, each eligible captain received an allocation of QS under the Program. A total of 186 captains received 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 BSAI crab fisheries. Since some persons participated as vessel owners and captains, and others received allocations based upon the activities of multiple vessels, only 294 unique persons are estimated to receive crab harvest share allocations. Affiliations among vessels or between vessels and processors, joint ownership of vessels, ownership of multiple vessels, sales, loss and replacement of vessels, etc., all confound accurate enumeration of unique entities, directly regulated by this action.

Since crab 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 drawn from the market analysis prepared as a part of the 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 per pound of \$4.53 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 FRFA relies on these

prices, which may be unrealistically low, to avoid underestimating the number of small entities. Applying these prices to the allocations, nine recipients are estimated to be large entities, and 285 are estimated to be small entities.

Allocations of processor quota share (PQS) under the program were made to 29 processors. Estimates of large entities were made, based on available records of employment, information on participation in processing activities in other fisheries, and analysts' knowledge of foreign ownership of vertically integrated processing companies. Of the recipients of PQS, nine are estimated to be large entities, leaving eleven small entities among the directly regulated universe under consideration within this FRFA.

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

The recordkeeping, reporting, and other compliance requirements of the proposed rule will not change from those of the Crab Rationalization Program. As such, this action requires no additional recordkeeping, reporting, or other compliance requirements.

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

The Council considered three alternatives as it designed and evaluated the potential methods for accommodating current fishery management timing and the need to provide an opportunity for a binding arbitration proceeding early during a crab fishing season. The alternatives differed only in the timing of when unaffiliated harvesters with IFQ could match their shares with processors with uncommitted IPQ. The alternatives have no effect on fishing practices or patterns.

The alternatives considered include the following:

- 1) No action. The timing for share matching and initiation of binding arbitration is based on the season start date for a crab fishery. Under this alternative, holders of uncommitted Class A IFQ and holders of uncommitted IPQ may voluntarily agree to commit their respective shares at any time. Beginning 25 days prior to a season opening, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. At any time between 25 days and 15 days prior to the season opening, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration at least 10 days prior to the season opening, if last best offers are submitted more than 15 days prior to the season opening, or, otherwise, within 5 days of the submission of the last best offers.
- 2) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (including a 5-day assessment period for negotiated commitments). **(the preferred alternative)** For 5 days after the issuance of IFQ and

IPQ (the assessment period), holders of Class A IFQ and holders of IPQ may voluntarily agree to commit their respective shares. After this 5-day assessment period, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period beginning 5 days after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.

- 3) The timing for share matching and initiation of binding arbitration is based on the issuance of IFQ and IPQ (without a 5-day assessment period for negotiated commitments). After the issuance of IFQ and IPQ, holders of uncommitted Class A IFQ may unilaterally commit that IFQ to any holder of uncommitted IPQ. During the 10-day period after the issuance of IFQ and IPQ, any holder of committed Class A IFQ may unilaterally initiate a binding arbitration proceeding with the IPQ holder to which the IFQ are committed. The parties to the arbitration will meet with the arbitrator to schedule the submission of information to the arbitrator and the terms and timing for submission of last best offers. The arbitrator is required to release the decision of the arbitration within 5 days of the submission of the last best offers.

The preferred alternative is Alternative 2. Alternative 1 and 3 are the significant alternatives to the proposed action. This section of the FRFA addresses a two part test to satisfy Section 604(a) of the RFA: (1) does either Alternative 1 or Alternative 3 accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes; and (2) would either alternative minimize any significant adverse economic impact of Alternative 2 on small entities? Essentially, would Alternative 1 or Alternative 3 achieve the desired outcome, at a lesser cost to small entities, than Alternative 2?

Alternative 1 (status quo) would maintain the existing timing for initiating a binding arbitration proceeding and does not effectively implement a portion of the Program as recommended by the Council. Experience with the status quo has revealed inconsistencies in management of the BSAI crab fisheries that prevent harvesters from initiating binding arbitration proceedings early in the season. Alternative 1 effectively precludes the use of the arbitration system as it was originally intended by maintaining the inconsistency between the timing of the issuance of IFQ and IPQ in a crab QS fishery and the requirement to initiate a binding arbitration prior to the start of the season.

Under status quo, participants have used the arbitration system, but only when both IFQ holders and IPQ holders have consented to a "lengthy season" approach, under which arbitration is delayed until an agreed upon time. Although participants have relied on the lengthy season approach to effectively extend the deadline for initiating an arbitration proceeding to resolve a dispute concerning terms of delivery, the greater degree of cooperation required by the lengthy season approach limits its reliability. Under this approach, IFQ holders need the concurrence of the IPQ holder to bring closure to the negotiation of terms. In addition, the lengthy season approach could delay resolution of disputes beyond the period that would be expected, if the process for initiating arbitration could be applied as expected. The result could be either a loss of operational certainty arising from unsettled terms of delivery and potentially a shift in negotiating leverage if one party were disproportionately affected by the uncertainty.

In addition to the lengthy season approach, the Program also provides for a share match approach that allows harvesters to unilaterally initiate arbitration because IFQ holders cannot rely on a “mutually agreed” delay in initiation of arbitration. Under status quo, participants could not use the “share match” approach because of the inconsistency in timing. In effect, the reliability of the arbitration system to resolve price disputes earlier in the season is limited. Continued delay and avoidance of binding arbitration could significantly alter the relative negotiating positions of the IFQ and IPQ holders, and could impact operational certainty for some participants.

Small entities are likely to suffer a disproportionate share of the possible adverse effects of Alternative 1 because their smaller operations are likely to have less flexibility and less access to fewer resources with which to respond to uncertainty and delay. As noted, small entities, which typically have fewer resources at their disposal, are more likely to incur costs that could render their operations uneconomical, perhaps forcing them to accept contract provisions that are not to their advantage, or even that result in their economic failure and departure from the crab fishery. Clearly, Alternative 1 neither achieves the objective of the action, nor minimizes the adverse impacts on small entities, when compared to the preferred alternative.

Alternative 2, the preferred alternative, provides harvesters with the opportunity to utilize the arbitration system to resolve disputes in a manner consistent with the original intent of Program. Although Alternative 2 does not provide a price resolution through arbitration prior to the start of the season as originally envisioned, it does provide an opportunity to resolve price disputes shortly after the start of the season. Alternative 2 provides a 5-day assessment period for negotiated IFQ commitments before the period during which IFQ holders can unilateral commit IFQ to a holder of uncommitted IPQ. The 5-day assessment period provides for more orderly settlement of commitments and contributes to stability in relationships among IFQ holders and IPQ holders by permitting persons to resolve negotiated commitments prior to allowing unilateral commitments. In addition, this 5-day period may result in more negotiated commitments by prioritizing negotiated relationships over unilateral commitments. This provision of Alternative 2 improves efficiency, reduces conflict and transaction costs for participants, contributes to stability in the fishery planning and prosecution process, and increases the potential for stable harvester/processor relationships by prioritizing negotiated commitments.

Alternative 3 modifies the timeline in a manner that would allow IFQ holders that have committed shares to an IPQ holder to commence an arbitration proceeding within the allotted time. By modifying the timeline, Alternative 3 address the shortcoming in Alternative 1. Alternative 3 is similar to Alternative 2, but it does not provide the 5-day assessment period to match shares after the issuance of IFQ and IPQ. The absence of such a period could provide an advantage to persons who are unable, or unwilling, to develop voluntary commitments. The absence of this period to allow IFQ and IPQ holders to finalize negotiated commitments also could be disruptive to markets by flooding IPQ holders with unilateral commitments from IFQ holders who fear being displaced by others. Alternative 3, while superior to Alternative 1 in terms of reducing the burden on small entities, does not provide a means of realizing these additional benefits which accrue from Alternative 2.

Alternative 2 minimizes the potential negative impacts that could arise under status quo and Alternative 3. Therefore, none of the significant alternatives to the preferred alternative have the potential to achieve the objectives of this action, while minimizing the adverse economic impacts on directly regulated small entities. Furthermore, based upon this and the RIR analysis, there is no evidence or basis for concluding that the impacts of the proposed action will have a disproportionate adverse effect on small entities, as compared to other entities operating under these rules in the BSAI crab fisheries.

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