

Secretarial Review

REGULATORY IMPACT REVIEW

and

FINAL REGULATORY FLEXIBILITY ANALYSIS

OF A PROVISION EXEMPTING CERTAIN CUSTOM PROCESSING FROM USE CAPS ON PROCESSOR SHARES

For a Regulatory Amendment to
Implement Amendment 27 to the Fishery Management Plan for
Bering Sea and Aleutian Islands King and Tanner Crabs

April 2009

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 “rationalization program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. Under the program, 90 percent of the annual harvest share allocation is issued as “Class A” individual fishing quota (IFQ), which must be delivered in a designated region and may only be delivered to a processor holding unused individual processing quota (IPQ). The recent reauthorization of the Magnuson Stevens Act (MSA) included a provision to exempt custom processing in the North region of the Bering Sea *C. opilio* fishery from processing use caps established under the crab rationalization program. This document analyzes that exemption and the interpretation of the MSA language, as well as options to extend the exemption to the following other fisheries:

- the Western Aleutian Islands golden king crab fishery,
- the Western Aleutian Islands red king crab fishery,
- the Eastern Aleutian Islands golden king crab fishery,
- the St. Matthews blue king crab fishery, and
- the Pribilof red and blue king crab fishery.

Purpose and Need Statement

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

In remote areas and small TAC fisheries, the extended fishing seasons under rationalization may cause processing activity to be extended over a longer period of time. This temporal extension of processing activity, together with the lower throughput levels, limits the ability of processors to achieve production efficiencies. Allowing concentration of processing in fewer facilities, by exempting custom processing at a plant from the use cap of the plant owners, could increase processing efficiency. This efficiency increase could improve competition in processing. In some cases, exemption of custom processing at a facility from use caps of the owner could provide for contingencies in the event of a facility breakdown, assist in allowing full harvest of the TAC, and contribute to community sustainability.

In remote areas (e.g. the western region) with small TAC fisheries for crab species (e.g. WAI golden king crab) and extended fishing seasons, the goals of sustaining communities in the region and allowing the full harvest of the TAC could be better achieved by exempting custom processing beyond the processing use cap by processors.

Two of the objectives of the proposed action are to protect the economic base of remote communities dependent on crab processing, and to allow for the efficient prosecution of quota held by fishermen.

Under the rationalization program, community interests in historic processing are protected by granting communities a right of first refusal on the transfer of shares from the community of origin. In some instances, the combination of consolidation of processing share holdings and the counting of processing at a plant against the plant owner’s cap on the use of processing shares could complicate the retention of processing in the community of origin. Exempting processing of shares in the community of origin from the use cap of the plant owner could facilitate retention of historical processing in communities.

Alternatives

The Council has identified the following alternatives for the three components of this action (**preferred alternatives in bold**):

Alternative 1: No action alternative (Status quo)

Alternative 2: Custom Processing Cap Exemption

Fisheries and Regions:

Custom processing will be exempt from use caps in the following regions and fisheries:

The North region of the Bering Sea *C. opilio* fishery (analyzed here for Congressionally mandated regulation change from MSA reauthorization – not optional)

Option 1) the Western Aleutian Islands golden king crab fishery

Suboption1: only West designated shares

Suboption2: West designated or Undesignated shares processed in the West region

Option 2) the Western Aleutian Islands red king crab fishery

Option 3) the Eastern Aleutian Islands golden king crab fishery

Option 4) the St. Matthew Island blue king crab fishery

Suboption: North region only

Option 5) the Pribilof Islands red and blue king crab fishery

Suboption: North region only

Definition of custom processing exemption:

Option 1) Physical processing of crab at a facility owned by an entity does not count toward the cap of the entity (only processor share holdings count toward an entity's cap).

Option 2) Custom processing is the processing of crab received with IPQ that has 50 percent or less common ownership with the processing plant.

Locations qualified for the exemption:

Custom processing will qualify for the exemption, provided that processing is undertaken in the applicable fishery and region at:

Option 1) a shore plant

Option 2) a shore plant, or a floating processor that is moored at a dock or docking facilities (e.g. dolphins, permanent mooring buoy) in a harbor in a community that is a first or second class city or a home rule city, except for the community of Atka, where a floating processor may anchor at any location, provided that it is within the municipal boundary.

Option 3) any shore plant or floating processor

Alternative 1: No action alternative (Status quo)

Alternative 2: Facility cap

Outside of the West region, no facility may process more than 60% of

a) EAI golden king crab

b) WAI red king crab

Alternative 1: No action alternative (Status quo)

Alternative 2: Provisions to protect interests of the community of origin

- Option 1) In the event that processing shares are transferred to the community entity holding the right of first refusal for those shares, the processing of those shares in the community of origin will not count toward the cap of the processing plant.
- Option 2) In the event that processing shares currently or formerly subject to a right of first refusal are transferred from the initial recipient, custom processing of shares in the community of origin will not be counted toward cap of the processing plant (the shares would only count toward the cap of the share holder).**

Effects of the general custom processing exemption

This section discusses the effects of the general exemption of custom processing arrangements on the different sectors and interests affected by the action.

Effects on processors

One of the potential benefits of the preferred alternative is an improvement in processor production efficiency. Under the status quo, the cap binds if custom processing prevented by the cap would increase processor production efficiency gains from being achieved. Under the preferred alternative, processors are unlikely to engage in custom processing prevented by the cap, unless they can achieve gains through that consolidation. The benefits from consolidation could also have distributional impacts within the sector. For example, consolidation of processing at a single facility beyond the cap will redistribute landings to the processor exceeding the cap from other facilities. In some cases, the processing share holder contracting for custom processing will be the operator of the facility losing the processing activity. In this case, it is unlikely that the share holder suffered any loss from the cap exemption. In other cases, the removal of the cap could lead to a redistribution of custom processing activity from one plant to another. In this case, the redistribution of activity will have a processing efficiency benefit for both the share holder and the facility receiving the exemption, but that benefit will be at a cost of a loss of processing by the facility losing processing activity.

Several factors other than processing efficiency could influence the extent to which processing would consolidate under the preferred alternative's exemption. First, processors must be able to reach an agreement on the price of custom processing. In some instances competition within the sector could diminish consolidation, if a processor perceives a benefit from keeping its processing independent. Some processors may wish to attempt to develop new products which might not be possible (or as advantageous) under custom processing arrangements. Given that the proposed exemptions do not apply to all fisheries or regions, it is likely that these efforts would not curtail consolidation under the exemption – ample amounts of landings exist that could be used for product development in other fisheries and regions. In addition, product development is least likely to occur in remote regions with less access to the markets. Only in the relatively small fisheries (the Western Aleutian Islands red king crab, Western Aleutian Islands golden king crab, the Eastern Aleutian Island golden king crab, the Pribilof red and blue king crab, and the St. Matthew Island blue king crab fisheries) would the exemption be applied to relatively less remote areas. Given these factors, the potential for consolidation under the exemption to curtail product development is limited.

The effect of the preferred alternative will differ across processors. Since the exemption is necessary only if a processor would exceed the 30 percent processing cap, a processing company will need to be a large presence in a fishery to benefit from the proposed exemption. Consequently, large processors in a fishery are the primary beneficiaries of this action. Processors that participate in the market where the exemption is being used could be disadvantaged by the exemption. Processors not limited by the cap could find that the exemption constrains their ability to grow, by removing shares from the already limited market. In

some instances, small processors that choose to have their shares custom processed could benefit from this action, but that benefit is likely to be relatively small in comparison to the benefits to larger entities that use the exemption to consolidate processing activity beyond the current cap.

Since the potential for custom processing under the exemption varies across regions and fisheries, the effects on the processing sector for each fishery and region are discussed independently. In the North region of the Bering Sea *C. opilio* fishery, in the first year of the rationalization program four plants operated. In the second year, only three operated. Based on the number of active processor accounts, most consolidation appears to have occurred at floating processors that have received deliveries for several different IPQ holders. IPQ holders in the North region in general have suggested that the current cap limits consolidation that would occur through custom processing in the absence of the caps. These IPQ holders generally assert that efficiency gains are possible by allowing processing to consolidate into a single facility. In drawing this conclusion, IPQ holders point to the extended period over which deliveries are made under the rationalization program. In the first two years of the program, North deliveries in the fishery were made over a period in excess of four months. Based on the current TAC and IPQ cap (without the exemption) and the number of days between the first and last landing in the first two years of the program, a processor in the North region would receive on average between 50,000 and 65,000 pounds per day. If processing consolidated to a single facility in the absence of the cap, average daily delivery to the plant would be approximately 75,000 and 95,000 pounds (based on the current TAC and number of days between the first and last landing in the first two years of the program). In the North region, little processing occurs other than crab processing. Crab processing tends to be labor intensive, requiring relatively large crews. The cost of transporting, housing, and provisioning crews at more than a single plant in the North region is asserted by IPQ holders to substantially drive up the cost of processing. Allowing custom processing in excess of the cap could relieve some of these costs by reducing expenditures on capital and crew.

The effects of the exemption on processors vary under the various options considered. Applying the exemption only to shore plants would provide a competitive advantage to the only shore plant in the area that currently processes crab – the shore plant in St. Paul. The ability to use floating processors would increase competition that might be limited, if the exemption applies only to shore plants. Requiring floaters to operate at a dock or docking facility (as is generally required under the preferred alternative) to qualify for the exemption might drive up the cost of using a floater by requiring it to pay docking and wharfage costs (and in some instances additional costs related to permitting).¹

Applying the exemption to the North region of the Pribilof red and blue king crab and the St. Matthew Island blue king crab fisheries would have an effect on the processing sector similar to the effect on the Bering Sea *C. opilio* fishery. The Pribilof and St. Matthew Island fisheries have not been open for several years. Both fisheries were historically prosecuted in the early fall, with most of the catch being made over a few weeks. Under the rationalization program, it is likely that the season would lengthen to some extent, but most participants believe that the fishery would continue to be prosecuted during the fall, possibly extending into the early winter. The current cap would require at least three processors to operate in the North region in both fisheries. As in the Bering Sea *C. opilio* fishery, consolidation through custom processing would reduce costs of capital and crews (transportation, housing, and provisions) by allowing all processing to occur at a single plant. Applying the exemption to the South (as under the preferred alternative) would effectively allow consolidation by IPQ holders that are at or over the cap, based on their North share holdings and processing activities. Processor efficiency benefits could be realized through applying the exemption to the South, but those benefits are likely to be relatively minor.

¹ The preferred alternative qualifies floating processors within the community of Atka for the exemption.

Applying the exemption only to shore plants in the Pribilof and St. Matthew Island fisheries would provide a competitive advantage to the St. Paul shore plant – the only shore plant that processes crab in the North region. In the South, where several shore plants process crab, limiting the exemption to shore plants is unlikely to provide any competitive advantage to one plant or processor over another. Extending the exemption to floating processors could increase competition. Limiting this extension to floaters operating at docks or docking facilities (as under the preferred alternative) would reduce that competition to some extent, but not substantially.

Processing in the Eastern Aleutian Islands golden king crab and the Western Aleutian Islands red king crab fisheries takes place almost exclusively in Dutch Harbor. In the Eastern Aleutian Islands golden king crab fishery, most processing takes place in the early fall, preceding or early in the Bristol Bay red king crab season. The Western Aleutian Islands red king crab fishery was historically prosecuted in the late fall, opening after the Bristol Bay red king crab fishery. Under the rationalization program, it could be prosecuted simultaneously with Bristol Bay red king crab. Applying the exemption to these fisheries (as is proposed under the preferred alternative) is likely to provide some processor efficiency by reducing the number of plants that must maintain crab lines during these seasons and coordinate landings with harvesters. The processor benefit arising from the exemption is likely to be notably less than the exemption will provide in other fisheries where substantial processing takes place in more remote regions. It is likely that most plants receiving deliveries from these fisheries will be groundfish/crab plants that maintain crews throughout the seasons for these fisheries regardless of whether consolidation is permitted under this action. Efficiencies might still be realized by reducing the number of crew that need to be on hand for deliveries and through other operational efficiencies arising from specializing operations within a plant. Limiting consolidation by applying the option to cap processing at a single plant at 60 percent of the IPQ in the fishery would still allow for some processor benefit from consolidation, while limiting the potential for processing to be consolidated in a single facility.

Fifty percent of the Western Aleutian Islands golden king crab fishery IPQ allocation is required to be landed in the West region; the remainder may be landed anywhere. The number of days between the first and last landing in the fishery fluctuated greatly in the first two years of the program. Even with a relatively short period of landings of 80 days, the average landing poundage per day is less than 40,000 pounds. If only the West region IPQ are landed in the West during this period, the daily landings will average less than 20,000 pounds. Applying the exemption to all processing in the West (as under the preferred alternative) could be beneficial to holders of IPQ in the fishery by allowing efficiencies to be realized at a single plant. As with other remote region processing, allowing consolidation in a single facility could reduce capital and crew related cost that arise from requiring multiple plants to operate to fully process the IPQ allocation.

If the exemption is limited to shore plants, the Adak shore plant (the only crab processing plant currently processing in the region) will be provided a competitive advantage over other plants. Extending the exemption to floating processors would increase competition among facilities. Limiting the exemption to floating processors at docks or docking facilities (as is generally proposed in the preferred alternative) could increase competition to some extent. Extending the exemption to processing of all IPQ in the fishery (as under the preferred alternative) could provide minor additional efficiency benefits to IPQ holders by allowing consolidation of any processing outside of the West in a single facility. Most likely any such processing would be in a shore plant in Dutch Harbor, where most of the processing in the fishery has historically taken place. The extension of the exemption to floating processors (or floating processors at docks or docking facilities) is unlikely to affect the level of competition.

Effects on harvesters

The effects of this action on harvesters are likely to be limited. In some cases, harvester operational efficiency could be improved, if processing is consolidated in a single location that has access to goods and services that might be desirable during the season. Harvester operational efficiency could suffer, if a single processor is unable to receive and process landings in a timely manner. This effect, however, is not likely except possibly in the Bering Sea *C. opilio* fishery, since the other fisheries have typically had relatively small TACs. In those smaller fisheries, harvester consolidation is likely to spread landings over time, limiting the potential for landings to overwhelm a processor. Additional harvester efficiencies could be realized in the Western Aleutian Islands golden king crab fishery, if processors choose to move their processing of Undesignated shares to the West region, closer to fishing grounds in that fishery. This consolidation will occur, only if processors are able to process landings in the West at the same or lower cost as in ports outside of the West region. In addition to harvester operational efficiency, the Council has suggested that this action should address two other harvester concerns – inseason contingencies and harvesting of the full TAC.

In certain instances, allowing a processor to exceed the share use cap through custom processing could address inseason contingencies (such as breakdown of a processing plant). For example, if one of two plants operating in a fishery subject to the exemption were to breakdown, all processing scheduled for the plant suffering the breakdown could be consolidated into the other plant, regardless of whether the plant would exceed the 30 percent cap. It is important to bear in mind that the exemption proposed in this action would be irrelevant, if the remaining processor is not at or over the cap. In addition, processors may be able to juggle deliveries between facilities with both remaining within the cap, if one plant is disabled temporarily. The exemption is important to addressing the contingency, only if consolidation of the processing in a single plant is beneficial to addressing the contingency and that consolidation would exceed the cap.

The custom processing exemption is likely to be most useful for addressing contingencies in circumstances where participants are not using the exemption, except for the contingency. In most fisheries and regions, if processing is consolidated beyond the 30 percent cap, through custom processing, few opportunities to further consolidate are likely to exist, limiting the effectiveness of the exemption in quickly addressing contingencies. In both the Bering Sea *C. opilio* fishery and the Western Aleutian Islands golden king crab fisheries, application of the cap without the exemption requires only two plants to operate. Consolidation beyond the 30 percent cap under the exemption could lead to processing being consolidated in a single plant. In the case of a contingency arising, the exemption is likely to help most, if processors have not previously chosen to consolidate their processing to a single plant. In that circumstance, two plants are likely to have been operating in the fishery or region, allowing concentration of landings at one of the plants. Despite this limitation, the exemption could provide flexibility to address contingencies through use of floating or shore plants.

The potential for this action to affect harvest of the full TAC is limited and difficult to discern. The only fishery affected by this action in which participants have failed to fully harvest the TAC is the Western Aleutian Islands golden king crab fishery. Harvesters took the full TAC in that fishery in the first season of the program, but only slightly more than 80 percent of that TAC in the second season of the program. Exemption of custom processing from use caps would likely have had no affect on this failure to harvest the TAC (or any future failure to harvest the TAC). It is believed that the weak market for golden king crab together with the relatively high cost of processing in the West region, led to failure to fully harvest the Western Aleutian Islands golden king crab TAC. It is also believed that harvester who left the largest number of shares unharvested, failed to timely commit those shares to an eligible IPQ holder to be eligible for arbitration. Had the harvester followed the timeline for matching shares and arbitration, the TAC might have been fully harvested.

Effects of the custom processing exemption on communities

The effects of this action on communities and community sustainability vary by region and fishery and depend on the specific options selected by the Council. In considering the effects of the action, it is important to distinguish effects arising out of the action – the exemption of custom processing from the processing share cap – from effects that would arise independent of the action. Under the current caps, in which custom processing counts against the cap of the processing plant owner, custom processing arrangements have facilitated the movement of shares among plants. The effect of this action is limited to the contribution of the exemption to that consolidation.

The effect of this action on communities will be determined by the extent to which the exemption would facilitate the movement of shares to, away from, or among communities. The potential for the action to result in the movement to or away from communities depends on the options selected by the Council. Specifically, by limiting the exemption to either, shore plants, or floating processors at docks or docking facilities (as under the preferred alternative), the action could facilitate the movement of shares to communities from areas outside of community boundaries or among communities. This movement among communities would benefit the receiving community and would be a detriment to the community losing the processing. It is clear, that it will not lead to additional processing outside of community boundaries. Under the option to limit the exemption to shore plants, processors are not offered benefits attainable by consolidating on floating processors. So, consolidation in communities will only take place to the extent that shore plants (and not community-based floating processors) can achieve benefits through consolidation. Similarly, if applicable to both shore plants and floating processors docked or at docking facilities (as under the preferred alternative), the exemption will only have an effect, if the consolidation under the exemption is of greater benefit to IPQ holders than less consolidated operations outside of communities. Considering only the potential for consolidation of processing at shore plants, it would appear that extending the exemption to floating processors docked or at docking facilities increases the potential for processing to be located in communities. Qualifying docked floating processors will increase the potential for a community based processor to be more efficient than a less consolidated operation outside of a community, by simply qualifying more community based operations for the exemption.

In the Bering Sea *C. opilio* fishery, the exemption of custom processing is limited to shore plants and floating processors “moored in the harbor,” by the Magnuson Stevens Act reauthorization. Currently, the only option defining platforms eligible for the exemption that meets that definition would limit the exemption to shore plants and floating processors at docks or docking facilities in a city. Under this option, the shore plant in St. Paul and floating processors in St. George and St. Paul would qualify for the exemption. The current trend is that processing has moved from St. George to St. Paul. A substantial number of IPQ holders have elected to move their processing to floating processors. While the exemption might appear to further facilitate this movement of processing from St. George, it is not clear that the exemption will effect that migration. On the other hand, the exemption could bring a benefit to St. Paul, if it requires the custom processing to be conducted at a shore plant or a docked floating processor to qualify for the exemption. This influx of activity and workers could bring additional economic activity to St. Paul, but at a cost to St. George.

The St. Matthew Island and Pribilof fisheries have been closed for several years. In the North region, shares in these fisheries are linked only to St. Paul, by the ‘cooling off’ provision and right of first refusal. Since most North shares in the Pribilof fishery were historically processed in St. Paul, application of the exemption to the North region is unlikely to facilitate the movement of shares into St. Paul; however, granting the exemption to floating processors regardless of their location could facilitate the movement of shares away from St. Paul. If the exemption is granted only to custom processing by shore plants or docked floating processors (as under the preferred alternative), the exemption would not facilitate movement of shares outside of communities, but at some point could be used to move processing from St.

Paul to another community (such as St. George), if a processor believed that greater efficiencies could be realized in that other community. In the St. Matthew Island fishery, most processing in the North has occurred outside of any community. Approximately 10 percent of the qualified historic processing occurred in St. Paul. Granting the exemption to shore plants or docked floating processors could facilitate the movement of processing into communities, if processors believe that consolidation will provide economic benefits. Currently, consolidation is most likely to occur in St. Paul, but in the long run, another community (such as St. George) could be a more attractive location for the consolidation of processing. If the exemption is granted to any floating processor, consolidation could draw historic processing from St. Paul, reducing benefits to St. Paul and Alaska communities in general.

Granting the exemption in the South region for the St. Matthew Island and Pribilof fisheries (as under the preferred alternative) is unlikely to have much effect on communities. Less than 35 percent of qualified historic processing occurred in the South in these two fisheries. Several processors participated, who have facilities in several locations. Since the cap is unlikely to bind in the South, and many facilities are available for processing, it is unlikely that the cap exemption is necessary for consolidation.

In the Western Aleutian Island red king crab fishery, processor shares are not subject to the ‘cooling off’ provision, rights of first refusal, or regional landing requirements. Processor shares are currently held by several processors, with most shares held by processors with Dutch Harbor plants. The fishery has been closed in most recent years. If the exemption is granted in this fishery (as under the preferred alternative), it is possible that processing could either consolidate in Dutch Harbor or move out of Dutch Harbor, most likely closer to the fishing grounds west of Dutch Harbor. If the exemption is limited to shore plants and docked floating processors (as under the preferred alternative), movement out of Dutch Harbor is likely to be to a community closer to the fishing grounds in the west, such as Adak. Applying a specific exemption to any floating processors anchored in Atka could facilitate the movement of processing to that community. If the exemption is granted to any floating processor, it is possible that no community would benefit from consolidation beyond the cap. The exemption in this fishery and the Western Aleutian Islands golden king crab fishery could interact, contributing to consolidation of processing, for both fisheries, in a single plant west of Dutch Harbor, nearer to the grounds for the two fisheries, if this fishery opens. Since processors are required to process 50 percent of the Western Aleutian Islands golden king crab in the West region (which does not include Dutch Harbor), if processor efficiencies can be gained by consolidation of processing from both fisheries in that region, it might be undertaken. Consolidation in the West could be stimulated, if harvesters are willing to share a portion of the efficiencies they realize by not needing to travel to deliver in Dutch Harbor. If the exemption is granted to any floating processor, it is possible that no community would realize any benefit of the consolidation of processing in excess of the cap.

Almost all qualified historic processing in the Eastern Aleutian Islands golden king crab fishery occurred in Dutch Harbor. Granting the exemption in this fishery (as under the preferred alternative) is unlikely to have any community effects, since the fishery is prosecuted relatively close to Dutch Harbor and most processor share holders operate shore plants in that community. If the cap is extended to any floating processor, it is possible that consolidation could occur on a floating processor outside of the community.

The Western Aleutian Islands golden king crab is not subject to the ‘cooling off’ provision or the right of first refusal. The fishery is subject to regional landing requirements, under which 50 percent of the IPQ is required to be landed in the West region, with the remainder free to be landed in any location. Extension of the exemption to this fishery (as under the preferred alternative) could lead to consolidation of processing, particularly in the West region. If limited to shore plants consolidation could currently occur only in Adak. Extending the exemption to docked floating processors (and floaters anchored in Atka), as under the preferred alternative, could make consolidation more likely, increasing competition and providing increased options to processing share holders to achieve benefits needed to stimulate that

consolidation. Limiting the exemption to shore plants and docked floating processors would ensure that benefits are realized by a community. If the exemption is granted to any floating processor, it is possible that the consolidation would move shares from communities that currently process landings in the fishery. If, as under the preferred alternative, the exemption is granted to any processor in the West region (including processing of undesignated shares), it could attract processing from locations outside of the West (e.g., from Dutch Harbor). For this to occur, processor share holders would need to perceive a benefit from this consolidation. It is possible that harvesters could share some of their operational efficiency benefits with processors (i.e., accept a lower price) to save on costs of travel from the fishing grounds to Dutch Harbor. If the exemption is granted to shore plants only outside of the West region, it could contribute to the consolidation of processing of regionally undesignated shares in Dutch Harbor. Granting the exemption to docked floating processors is unlikely to have any additional effects, since most of the processing share holders operate facilities in Dutch Harbor. If the cap is extended to any floating processor, it is possible that consolidation could occur on a floating processor outside of the community.

Effects on management and enforcement

The effects of this action on management and enforcement burdens will be limited and will depend on the specific options selected. In general, exempting custom processing activity from the cap will have a minor affect on management and enforcement burdens. With relatively high processor share use caps, the exemption could apply in only a few cases in any fishery. Under the preferred alternative, under which share caps apply only to share holdings, the management burden will decline to the extent that the provision relieves the managers of the need to track plant ownership. Under the option that applies the exemption only in the case when the share holder and plant owner have limited common ownership, assessing whether the common ownership threshold is met would require plant ownership information. Under that option, the management burden of assessing plant ownership will be unchanged from the status quo. Limiting the exemption, based on the location of the processor, could increase the oversight burden. If the exemption applies only to shore plants or to shore plants and any floating processor, the application of the exemption will be clear and will be similar to the current management burden of simply tracking share holdings and usage. If the exemption, is limited to shore plants and floating processors that are docked or at docking facilities, monitoring compliance could be slightly more complicated, as processing locations for floaters will need to be tracked.

Exemption of custom processing in the community of origin

The second part of this action would extend cap exemption to custom processing that occurs in the community of origin after the transfer of processing shares from the initial recipient of those shares. Under the first option, the exemption would apply only if the shares are transferred to the entity that holds the right of first refusal on behalf of the community of origin. Under the second option (as under the preferred alternative), the exemption would apply to custom processing of the shares in the community, regardless of the holder of the processing shares.

Granting the cap exemption to custom processing could facilitate improvements in processing efficiency, particularly if a community entity is committed to maintaining processing of its holdings in the community of origin. If the entity would be compelled to open a new, second facility in a community because custom processing at an existing plant would not comply with the cap, it is clear that the cost of processing would increase. Likewise, if the exemption is granted to entities other than the community entity, it is possible that some efficiency gain could occur for a share holder that wishes to comply with a commitment to process in the community of origin under the right of first refusal. The effects of this action will differ across processors. Since the exemption is irrelevant if a processor does not exceed the 30 percent processing cap, only large processors in a fishery are likely to derive a benefit from the proposed exemption.

The effects of this action on harvesters are likely to be very limited. Although the action would exempt some processing from the current cap, the exemption is likely to have limited applicability and be used infrequently. Harvester operational efficiency could be improved or impaired, depending on the circumstances. If the processing location requires additional travel or has fewer goods and services available, harvesters could lose efficiency. If processing is concentrated in an advantageous location, harvesters could realize a benefit from processing concentration under this action. In any case, the effects on harvesters are likely to be limited, since the exemption is unlikely to apply to many circumstances.

The effects of this action on communities are likely to be limited and differ across communities. Communities that seek to retain historic processing could benefit from processors being permitted to process in excess of the cap under the exemption. Although some communities could benefit from retention of crab processing, others are likely to be frustrated to the extent that this action prevents the development of additional processing activity. The specific effects of exemption created by this action on the distribution of processing are uncertain and largely depend on the actions of processors in the fisheries.

The two different options under consideration could have different effects on different communities. Under the first option, a community entity would be required to hold shares for the exemption to apply. This option could be cost prohibitive for some community entities, which have limited resources to acquire shares. Under the second option, the exemption would apply to processing in the community of origin, regardless of the holder of the shares. This provision may help a community retain shares that the community entity could not afford to purchase, by allowing others to use the exemption. Under this provision, however, the nexus between the share holdings and the community is much weaker than when those shares are held by the community entity.

Since the exemption defined by this action is unlikely to be used extensively, its effect on management and enforcement will be limited. The management burden of the different provisions will differ slightly under the two options. Under the first option, the exemption will apply only to shares held by a community entity. Administration of the provision will be simplified, since any time the shares are held by a community entity, the physical processing of the shares will not affect compliance with the share cap. Under the second option, monitoring the cap will be slightly more complicated. The exemption will apply to any processing of the shares in the community of origin, after the shares have been transferred from the initial recipient of the shares. This provision will require administrators to track share holdings of any entity after their first transfer and disregard any processing of the shares in the community of origin. Administration of this provision will require administrators to monitor the processing of shares in the community of origin, regardless of the share holder, for purposes of applying the exemption. Although the provision is relatively straight forward to apply, the tracking of shares is more complicated than under the first option. Since neither of the options is anticipated to have broad applicability, the administrative burden under either is anticipated to be minimal.

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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 corresponding to a portion of the harvest share pool. Under the program, 90 percent of the annual catcher vessel owner harvest share allocation is issued as “Class A” individual fishing quota (IFQ), which must be delivered in a designated region and may only be delivered to a processor holding unused individual processing quota (IPQ). The recent reauthorization of the Magnuson Stevens Act (MSA) included a provision to exempt custom processing in the North region of the Bering Sea *C. opilio* fishery from processing use caps established under the crab rationalization program. This document analyzes that exemption and the interpretation of the MSA language, as well as options to extend the exemption to the following other fisheries:

- the Western Aleutian Islands golden king crab fishery,
- the Western Aleutian Islands red king crab fishery,
- the Eastern Aleutian Islands golden king crab fishery,
- the St. Matthews blue king crab fishery, and
- the Pribilof red and blue king crab fishery.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of the alternative to exempt custom processing from the use cap of the processing platform. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.²

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). Throughout this analysis, this document is referred to as the “Crab EIS”.

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:

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

² 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 potential economic redistributive and production efficiency effects arising from the exemption of certain custom processing from the processor share use caps. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

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 the purpose and need statement for this action:

In remote areas and small TAC fisheries, the extended fishing seasons under rationalization may cause processing activity to be extended over a longer period of time. This temporal extension of processing activity, together with the lower throughput levels, limits the ability of processors to achieve production efficiencies. Allowing concentration of processing in fewer facilities, by exempting custom processing at a plant from the use cap of the plant owners, could increase processing efficiency. This efficiency increase could improve competition in processing. In some cases, exemption of custom processing at a facility from use caps of the owner could provide for contingencies in the event of a facility breakdown, assist in allowing full harvest of the TAC, and contribute to community sustainability.

In remote areas (e.g. the western region) with small TAC fisheries for crab species (e.g. WAI golden king crab) and extended fishing seasons, the goals of sustaining communities in the region and allowing the full harvest of the TAC could be better achieved by exempting custom processing beyond the processing use cap by processors.

Two of the objectives of the proposed action are to protect the economic base of remote communities dependent on crab processing, and to allow for the efficient prosecution of quota held by fishermen.

Under the rationalization program, community interests in historic processing are protected by granting communities a right of first refusal on the transfer of shares from the community of origin. In some instances, the combination of consolidation of processing share holdings and the counting of processing at a plant against the plant owner’s cap on the use of processing shares could complicate the retention of processing in the community of origin. Exempting processing of shares in the community of origin from the use cap of the plant owner could facilitate retention of historical processing in communities.

2.2 Description of Alternatives

The Council has identified the following two alternatives for this action:

Alternative 1: No action alternative (Status quo)

Alternative 2: Custom Processing Cap Exemption (preferred alternative in bold)

Fisheries and Regions:

Custom processing will be exempt from use caps in the following regions and fisheries:

The North region of the Bering Sea *C. opilio* fishery (analyzed here for Congressionally mandated regulation change from MSA reauthorization – not optional)

Option 1) the Western Aleutian Islands golden king crab fishery

Suboption1: only West designated shares

Suboption2: West designated or Undesignated shares processed in the West region

Option 2) the Western Aleutian Islands red king crab fishery

Option 3) the Eastern Aleutian Islands golden king crab fishery

Option 4) the St. Matthew Island blue king crab fishery

Suboption: North region only

Option 5) the Pribilof Islands red and blue king crab fishery

Suboption: North region only

Definition of custom processing exemption:

Option 1) Physical processing of crab at a facility owned by an entity does not count toward the cap of the entity (only processor share holdings count toward an entity's cap).

Option 2) Custom processing is the processing of crab received with IPQ that has 50 percent or less common ownership with the processing plant.

Locations qualified for the exemption:

Custom processing will qualify for the exemption, provided that processing is undertaken in the applicable fishery and region at:

Option 1) a shore plant

Option 2) a shore plant, or a floating processor that is moored at a dock or docking facilities (e.g. dolphins, permanent mooring buoy) in a harbor in a community that is a first or second class city or home rule city, except for the community of Atka, where a floating processor may anchor at any location, provided that it is within the municipal boundary.

Option 3) any shore plant or floating processor

Facility cap

Outside of the West region, no facility may process more than 60% of

a) EAI golden king crab

b) WAI red king crab

Alternative 1: No action alternative (Status quo)

Alternative 2: Provisions to protect interests of the community of origin

- Option 1) In the event that processing shares are transferred to the community entity holding the right of first refusal for those shares, the processing of those shares in the community of origin will not count toward the cap of the processing plant.
- Option 2) In the event that processing shares currently or formerly subject to a right of first refusal are transferred from the initial recipient, custom processing of shares in the community of origin will not be counted toward cap of the processing plant (the shares would only count toward the cap of the share holder).**

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 and background on communities that depend on the fisheries that could be affected by this action

2.3.1 Management of the fisheries

Nine Bering Sea and Aleutian Island crab fisheries are managed under the rationalization program. Under the program, holders of LLP licenses endorsed for a fishery were issued vessel owner quota shares (QS), which are long term shares, based on their qualifying harvest histories in that fishery. Catcher processor license holders were allocated catch processor vessel owner QS for their history as catcher processors; catcher vessel license holders were issued catch vessel QS based on their history as a catcher vessel. QS annually yield individual fishing quota (IFQ), which are privileges to harvest a particular amount of crab in pounds in a given season. 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 unused individual processor quota (IPQ).³ The remaining 10 percent of these annual IFQ are issued as “B shares” or “Class B IFQ,” which may be delivered to any processor.⁴ 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 TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.⁵

In addition to processor share landing requirements, Class A IFQ (along with IPQ) 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

³ Currently, the C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ landing privileges during the first three years of the program. During that period, the IPQ corresponding to the C share allocations are withheld.

⁴ The terms “A share” and “Class A IFQ” are used interchangeably in this paper, as are the terms “B share” and “Class B IFQ”.

⁵ 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 entire IFQ allocations as A shares (and are not allocated B shares). The rationale for issuing only A shares to PQS holders and their affiliates is that these persons do not need the extra negotiating leverage derived from B shares. To maintain 10 percent of the 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).

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 – Undesignated/West (west of 174°W longitude)
Eastern Aleutian Islands golden king crab – South of 56°20'N latitude
Western Aleutian Islands golden king crab – South of 56°20'N latitude

During the first two years of the program, most processing shares were subject to a 'cooling off' period limitation. The cooling off period required the landings made using the shares to be processed in the community where those shares were historically processed (i.e., the 'community of origin'). Most processing shares are also subject to a right of first refusal, under which an entity identified by the community of origin is provided a right of first refusal on the transfer of any shares for use outside the community. The right of first refusal is triggered by any sale of PQS, under which the buyer does not commit to use 80 percent of the IPQ yielded by the PQS in the community during 2 of the 5 years following the transfer. In addition, the buyer must grant a right of first refusal to the community entity to exempt the transfer from the right of first refusal. Rights of first refusal are not permanent under the program, but lapse if the IPQ are used by the holder of the PQS outside of the community for a period of three consecutive years.

Processing share allocations are subject to limits on consolidation intended to ensure a diversity of processors in the market. In each fishery, a processor is limited to using 30 percent of the processor shares. In addition, no processor is permitted to use in excess of 60 percent of the North region processing shares in the Bering Sea *C. opilio* fishery. In applying the caps, an entity is credited with using all shares (either PQS or IPQ) held by the entity (including any of its affiliates)⁶ and all landings made with IPQ that are processed by the entity (including any of its affiliates). Consequently, crab that is processed by a facility under a custom processing arrangement is credited to the cap of the entity that owns the facility (and its affiliates).

MSA exemption of Bering Sea *C. opilio* North custom processing in the from processing use caps

The suggested revision to the use caps by this action would be based on the exemption developed in the MSA for the Bering Sea *C. opilio* fishery. Generally, that provision would exempt custom processing in the North region from the use caps. Provided processing share holders comply with the custom processing exemption, all North region *C. opilio* processing could be undertaken at a single facility without violating the caps. The rationale for the MSA provision is that the slow rate of landings under the rationalization program has reduced processing efficiencies, particularly in low TAC years. Allowing all North processing to occur at a single platform would improve efficiencies. Limiting the exemption to custom processing is intended to prevent consolidation of holdings that could occur, if the processing of held or owned shares were included in the exemption. The specific provision in the MSA affecting the *C. opilio* fishery processing caps provides:

- (1) IN GENERAL. – Notwithstanding sections 680.42(b)(ii)(2) and 680.7(a)(ii)(7) of title 50, Code of Federal Regulations, custom processing arrangements shall not count against any use

⁶ In general, an entity is considered an affiliate of another entity if the other has a controlling interest or if the two have 10 percent or more common ownership.

cap for the processing of opilio crab in the Northern Region so long as such crab is processed in the North region by a shore-based crab processor.

- (2) SHORE-BASED CRAB PROCESSOR DEFINED. – In this paragraph, the term “shore-based processor” means any person or vessel that receives, purchases, or arranges to purchase unprocessed crab, that is located on shore or moored within the harbor.

MSA §122(e).

The provision references two sections of the crab rationalization program regulations. Section 680.7 defines prohibitions, including the prohibition on exceeding the processing share use cap, from which custom processing in the North region would be exempt. That section specifically defines a prohibition:

For an IPQ holder to use more IPQ crab than the maximum amount of IPQ that may be held by that person. *Use of IPQ includes* all IPQ held by that person and *all IPQ crab that are received by any R[egistered] C[rab] R[ceiver] at any shoreside crab processor or stationary floating crab processor in which that IPQ holder has a 10 percent or greater direct or indirect interest.* (50 CFR 680.7(a)(7)) (emphasis added).

Section 680.42 sets out the specific percent limits of the use caps, which include both a use cap of 30 percent on Bering Sea *C. opilio* processing shares and a use cap of 60 percent on North region Bering Sea *C. opilio* processing shares. The provision is believed to be intended to exempt custom processing arrangements from both of these caps.

To fully implement the use cap exemption, NOAA Fisheries will need to adopt conforming regulations. This analysis is part of that regulatory process. Prior to this action, NOAA General Counsel issued a guidance letter concerning its interpretation of the MSA Bering Sea *C. opilio* custom processing exemption (see Appendix A). That guidance will be superseded by future regulations addressing the exemption.

Implementation of this MSA provision has raised a few implementation questions. First, ‘custom processing’ must be defined for purposes of applying the exemption. Currently, federal regulations do not contain a definition of custom processing. Generally, custom processing is understood to be an arrangement under which a person processes crab on behalf of another, never taking ownership of the crab. Alaska regulations define a “custom processor” as a person who sells or offers for sale the service of seafood processing but who does not own the seafood being processed (18 AAC 34.990). This provision is implemented by identifying the actual owner of the crab (rather than the person processing the crab under the custom processing arrangement) on a State of Alaska fish ticket. Section 680.5(d)(8) contains a provision requiring a processor of crab to identify the party for which custom processing is being undertaken. This requirement could be used to identify processing that falls within the use cap exemption. Such an approach parallels the State of Alaska’s treatment of custom processing arrangements (which is used, in part, for determining liability for fish tax payments). NOAA General Counsel has stated in a letter interpreting the MSA provision for enforcement purposes that the exemption would apply only to processing undertaken by an entity that is not affiliated with the share holder (Appendix B). Under this interpretation, entities under common control or having in excess of 10 percent common ownership would be considered affiliates (see 50 CFR 680.2). Because the MSA language does not address this issue, the Council could choose to revise this interpretation through this action.

A second issue that arises is the interpretation of “moored within the harbor”. The provision is somewhat ambiguous, since no definition of “harbor” was provided in the legislation or contained in the current

regulations. Legislative intent is silent concerning this definition. Since the North region contains several harbors – for example, St. Paul, St. George, and Nome are all in the North region and have harbors – the provision will require development of a workable definition of “moored within the harbor”. The phrase is believed to be intended to protect community interests. The current, interim interpretation of the provision is that processing on a floating processor within the harbors of St. Paul and St. George would be considered moored within the harbor. Because the statutory language is ambiguous, a different definition could be adopted by the Council as a part of this package.

2.3.2 The harvest sector

Under the rationalization program, QS are allocated in two types. Vessel owner shares are allocated for 97 percent of the fishery; crew shares are allocated for the remaining 3 percent of the fishery. Both share types are divided among catcher vessels and catcher processors, depending on the type of operation that led to the initial allocation. Catcher vessel QS carry regional designations, which apply to annual allocations of Class A IFQ. The distribution of catcher vessel QS holdings varies substantially across fisheries (see Table 1 and Table 2). The regional distribution of shares differs with historic landing patterns, which arose from the geographic distribution of fishing grounds and processing activities. Currently, A shares, which are subject to IPQ and regional landing requirements, are only allocated to holders of catcher vessel owner QS. Catcher vessel crew shares are not subject to these limitations.

Table 1. Catcher vessel owner quota share holdings as a percent of the catcher vessel owner share pool.

Fishery	Share holdings by region						Across regions			
	Region	QS holders	Percent of pool	Mean holdings	Median holdings	Maximum holding	QS holders	Mean holdings	Median holdings	Maximum holding
Bristol Bay red king crab	North	32	2.5	0.08	0.04	0.24	236	0.42	0.36	3.60
	South	234	97.5	0.42	0.36	3.60				
Bering Sea <i>C. opilio</i>	North	202	46.9	0.23	0.17	1.35	221	0.45	0.43	2.85
	South	205	53.1	0.26	0.19	2.82				
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	234	100.0	0.43	0.33	2.83	234	0.43	0.33	2.83
Western Bering Sea <i>C. bairdi</i>	Undesignated	234	100.0	0.43	0.33	2.85	234	0.43	0.33	2.85
Eastern Aleutian Island golden king crab	South	13	100.0	7.69	6.98	21.39	13	7.69	6.98	21.39
Western Aleutian Island golden king crab	Undesignated	13	50.0	3.84	1.82	20.46	13	7.69	3.31	45.51
	West	9	50.0	5.56	2.33	25.04				
Western Aleutian Island red king crab	South	32	100.0	3.13	0.88	22.09	32	3.13	0.88	22.09
St. Matthew Island blue king crab	North	121	78.3	0.65	0.58	3.43	132	0.76	0.65	4.54
	South	84	21.7	0.26	0.14	2.23				
Pribilof red and blue king crab	North	85	67.5	0.79	0.55	3.10	112	0.89	0.53	3.43
	South	76	32.5	0.43	0.28	2.82				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2007-2008.

Note: These share holdings data are publicly available and non-confidential.

Table 2. Catcher vessel crew quota share holdings as a percent of the catcher vessel crew share pool.

Fishery	Share holdings by region						Across regions			
	Region	QS holders	Percent of pool	Mean holding	Median holding	Maximum holding	QS holders	Mean holding	Median holding	Maximum holding
Bristol Bay red king crab	North	13	2.6	0.20	0.17	0.32	153	0.65	0.55	2.07
	South	153	97.4	0.64	0.52	2.07				
Bering Sea <i>C. opilio</i>	North	129	47.6	0.37	0.31	1.94	134	0.75	0.69	2.11
	South	127	52.4	0.41	0.34	1.59				
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	150	100.0	0.67	0.62	2.09	150	0.67	0.62	2.09
Western Bering Sea <i>C. bairdi</i>	Undesignated	150	100.0	0.67	0.62	2.09	150	0.67	0.62	2.09
Eastern Aleutian Island golden king crab	South	11	100.0	9.09	9.18	20.14	11	9.09	9.18	20.14
Western Aleutian Island golden king crab	Undesignated	8	51.4	6.43	4.87	18.30	8	12.50	9.67	37.75
	West	7	48.6	6.94	4.89	19.45				
Western Aleutian Island red king crab	South	4	100.0	25.00	16.53	57.26	4	25.00	16.53	57.26
St. Matthew Island blue king crab	North	63	80.9	1.28	1.26	2.72	69	1.45	1.41	3.32
	South	42	19.1	0.46	0.17	2.57				
Pribilof red and blue king crab	North	33	70.3	2.13	2.13	4.83	150	0.67	0.62	2.09
	South	31	29.7	0.96	0.79	4.03				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2007-2008.

Note: These share holdings data are publicly available and non-confidential.

During the first two years of the program, the distribution of catch across the fleet of catcher vessels varies across regions and fisheries (see Table 3 and Table 4). As expected, the number of vessels in a region rises with the share of the TAC allocated to the region. In the Bering Sea *C. opilio* fishery, most vessels participated in both regions, with catch fairly equally distributed across the two regions, as is the TAC. No data could be revealed for the Western Aleutian Islands golden king crab fishery, since fewer than three catcher vessels participated in that fishery in the West region in each of the two first years of the program.

Table 3. Catch and number of catcher vessels harvesting IFQ by share region (2005-2006).

Fishery	Region	Number of vessels	Harvest (as a percent of total allocation)		
			Mean harvest	Median harvest	Average of four largest harvests
Bristol Bay red king crab	All	88	1.12	0.85	3.90
	North	9	0.24	0.21	0.32
	South	84	0.97	0.70	3.23
Western Bering Sea <i>C. bairdi</i>	All	42	1.25	0.25	6.97
Eastern Aleutian Islands golden king crab	All	6	15.74	12.92	18.86
	South	6	13.64	9.65	16.20
Bering Sea <i>C. opilio</i>	All	75	1.24	1.01	3.59
	North	59	0.63	0.47	1.86
	South	69	0.61	0.38	1.99

Source: RAM crab IFQ database (2007).

Note: "All" includes catch of Class B IFQ and C share IFQ.

Table 4. Catch and number of catcher vessels harvesting IFQ by share region (2006-2007).

Fishery	Region	Number of vessels	Harvest (as a percent of total allocation)		
			Mean harvest	Median harvest	Average of four largest harvests
Bristol Bay red king crab	All	79	1.22	1.05	3.27
	North	6	0.35	0.35	0.42
	South	75	1.08	0.81	2.76
Western Bering Sea <i>C. bairdi</i>	All	34	1.83	0.02	8.32
Eastern Bering Sea <i>C. bairdi</i>	All	33	2.20	0.30	9.58
Eastern Aleutian Islands golden king crab	All	5	19.79	14.98	22.66
	South	5	16.63	12.69	19.91
Bering Sea <i>C. opilio</i>	All	66	1.38	1.11	4.14
	North	43	0.86	0.75	1.95
	South	54	0.78	0.56	2.50

Source: RAM crab IFQ database (2007).

Note: "All" includes catch of Class B IFQ and C share IFQ.

In the first two years of the program, participants have harvested most of the IFQ allocated (see Table 5). The exceptions are the Western Bering Sea *C. bairdi* fishery in both years and the Eastern Bering Sea *C. bairdi* and the Western Aleutian Islands golden king crab fisheries in 2006-2007. The *C. bairdi* fisheries are reported by participants to be particularly difficult to prosecute because of low catch rates.⁷ Harvest of the Western Aleutian Islands golden king crab fishery is reported to be economically challenging because of low market prices for golden king crab. In the 2005-2006 season, participants harvested approximately 98 percent of that TAC. During the 2006-2007 season, only the Western Aleutian Islands golden king crab fishery left a substantial amount of crab unharvested. In that fishery, approximately 150,000 pounds per participating vessel was left unharvested.

Table 5. Harvested and unharvested IFQ by fishery (2005-2006 and 2006-2007).

Fishery	Landed pounds	IFQ allocation	Unharvested IFQ	Percent of IFQ unharvested	Unharvested IFQ per landing	Unharvested IFQ per participating vessel
Bristol Bay red king crab	16,472,400	16,496,103	23,703	0.1	93	266
Bering Sea <i>C. opilio</i>	33,248,009	33,472,454	224,445	0.7	746	2,878
Western Bering Sea <i>C. bairdi</i>	791,025	1,457,995	666,970	45.7	9,137	15,511
Eastern Aleutian Islands golden king crab	2,569,209	2,669,970	100,761	3.8	3,149	14,394
Western Aleutian Islands golden king crab	2,382,468	2,430,006	47,538	2.0	1,132	15,846
Bristol Bay red king crab	13,887,531	13,974,300	86,769	0.6	474	1,071
Bering Sea <i>C. opilio</i>	32,699,911	32,909,400	209,489	0.6	770	2,993
Eastern Bering Sea <i>C. bairdi</i>	1,267,106	1,687,500	420,394	24.9	7,507	11,678
Western Bering Sea <i>C. bairdi</i>	633,910	984,600	350,690	35.6	5,845	9,741
Eastern Aleutian Islands golden king crab	2,692,009	2,700,000	7,991	0.3	250	1,332
Western Aleutian Islands golden king crab	2,002,186	2,430,000	427,814	17.6	13,800	142,605

Source: NMFS RAM IFQ database, crab fishing years 2005-2006 and 2006-2007.

Note: A single IPQ overage occurred in the Eastern Bering Sea *C. bairdi* fishery in 2006-2007, which is not reflected in this table.

Three overages during this season was a catcher processor overage.

The distribution of unharvested IFQ by share type reveals that harvest of owner IFQ in most fisheries exceeds 95 percent of the owner IFQ allocation (see Table 6). In addition, the percentage of shares harvested is consistent across regions. According to participants, the exception is the Western Aleutian Islands golden king crab fishery. Although the amount of unharvested IFQ cannot be reported on a

⁷ The two *C. bairdi* fisheries are not affected by this action.

regional basis, participants report that most of the unharvested IFQ are from the West region, where processing costs are reported to be relatively high. The regional distribution of unharvested IFQ is important for this action, since the exemption could be applied on a regional basis only in the West to facilitate harvest of the TAC in that area.

Table 6. Percentage of IFQ harvested operation type, share type, and region (2006-2007).

Season	Fishery	Catcher vessel												Catcher processor			
		Owner										Crew		Owner		Crew	
		A Share North		A Share South		A Share West		A Share Undesignated		B share							
		Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested	Number of vessels	Percent of IFQ harvested
2005 - 2006	Bristol Bay red king crab	11	100.0	46	99.9					40	99.7	56	95.6	8	100.0	7	99.8
	Bering Sea <i>C. opilio</i>	36	99.3	38	99.6					55	99.2	52	93.6	8	99.9	8	87.4
	Eastern Aleutian Islands golden king crab			4	95.1					4	92.6	5	95.9	2	*		
	Western Aleutian Island golden king crab					2	*	3	*	5	96.7	4	97.0	2	*	2	*
	Western Bering Sea <i>C. bairdi</i>							48	58.4	33	41.5	72	27.9	9	33.0	13	11.1
2006 - 2007	Bristol Bay red king crab	5	99.5	21	99.5					30	98.6	35	96.1	6	99.9	6	100.0
	Bering Sea <i>C. opilio</i>	18	99.3	19	99.3					34	99.1	29	96.8	5	100.0	8	86.8
	Eastern Aleutian Islands golden king crab			3	*					3	100.0	3	88.4	2	*		
	Eastern Bering Sea <i>C. bairdi</i>							27	79.0	22	67.8	55	55.5	5	42.5	11	55.0
	Western Aleutian Island golden king crab					2	*	2	*	4	100.0	3	84.4	2	*	2	*
	Western Bering Sea <i>C. bairdi</i>							25	68.4	24	55.5	55	48.6	5	33.4	11	45.0

Source: RAM IFQ database, 2005-2006 and 2006-2007.

* withheld for confidentiality.

Note: blanks are inapplicable.

2.3.3 The processing sector

Under the crab program, crab harvested with Class A IFQ, which make up 90 percent of the catcher vessel owner share allocation, must be delivered to the holder of IPQ. The remaining 10 percent of harvests made with catcher vessel owner shares (harvest made with Class B IFQ) are open to competition among all processors (including those who do not hold processing shares). Annual allocations arising from C share QS are subject to the same competition that exists for Class B IFQ. Processing QS holdings are substantially more concentrated than either catcher vessel owner or catcher vessel crew QS holdings (see Table 7).

Since processing share caps limit both holdings and processing of landings, share holdings may constrain some processors from engaging in custom processing arrangements. Based on current share holdings, the 30 percent cap constrains at least one processor in the Eastern Aleutian Islands golden king crab fishery, the Western Aleutian Islands golden king crab fishery, the Western Aleutian Islands red king crab fishery, and the St. Matthew Island blue king crab fishery from engaging in any custom processing. In the Western Aleutian Islands golden king crab and the St. Matthews Island blue king crab fishery, one processor's share holdings in a remote region alone almost equal the cap, effectively preventing any custom processing.

Table 7. Processing quota share holdings as a percent of the processing quota share pool.

Fishery	Share holdings by region					Across regions			
	Region	QS holders	Mean holding	Median holding	Maximum holding	QS holders	Mean holding	Median holding	Maximum holding
Bristol Bay red king crab	North	2	1.28	1.28	2.33	16	6.25	2.60	23.16
	South	16	6.09	2.60	20.83				
Bering Sea <i>C. opilio</i>	North	8	5.87	5.51	15.46	20	5.00	2.08	25.18
	South	18	2.95	0.25	9.72				
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	23	4.35	0.83	24.26	23	4.35	0.83	24.26
Western Bering Sea <i>C. bairdi</i>	Undesignated	23	4.35	0.83	24.26	23	4.35	0.83	24.26
Eastern Aleutian Island golden king crab	South	8	12.50	6.04	45.91	8	12.50	6.04	45.91
Western Aleutian Island golden king crab	Undesignated	8	6.25	0.41	33.29	9	11.11	1.03	62.98
	West	9	5.56	0.49	29.69				
Western Aleutian Island red king crab	South	9	11.11	1.03	62.98	9	11.11	1.03	62.98
St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	12	8.33	5.06	32.67
	South	9	2.41	1.76	7.81				
Pribilof red and blue king crab	North	6	11.26	12.01	23.28	14	7.14	3.17	24.49
	South	11	2.95	0.98	13.50				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2007-2008.

Note: These share holdings data are publicly available and non-confidential.

In addition to regional landing requirements that apply to most processor shares, most processor share allocations are also subject to two other different geographic provisions. Most processor quota shares are subject to a “cooling off” provision, which required IPQ to be used in the “community of origin” (or community of the processing history that led to the initial allocation of those processing quota shares) subject to minor exceptions.⁸ In addition, most processor shares are subject to a ‘right of first refusal’ held by an entity designated by the community of origin. The right is triggered by the sale of shares for use outside the community of origin.⁹ The right of first refusal is a weak protection in some respects. It does not apply to the use of shares outside the community of origin by the PQS holder. In addition, the right lapses after 3 consecutive years of use of IPQ outside of the community of origin by the PQS holder. The right also does not apply to transfers of IPQ, unless a person other than the PQS holder has used more than 20 percent of the IPQ outside the community of origin in three of the five years preceding the IPQ transfer. The permeability of the right of first refusal limits its potential to prevent the migration of processing from the community of origin.

Since the “cooling off” provision limited movement of processing from the community of origin during the first two years of the program, the distribution of processing of landings in the first two years of the program may not be representative of future landings distributions. The distribution of rights of first refusal should provide a reasonable indication of the starting point of the distribution of processing across communities.¹⁰ In reviewing this distribution, it should be noted that changes are likely to occur as processors move shares to realize efficiencies in the fisheries. Since the right of first refusal does not apply to all transfers of IPQ and does not apply to the processing of shares by the PQS holder outside of the community of origin, that provision should be viewed as only a starting point for examining the

⁸ Movement of the lesser of 10 percent of and 500,000 pounds of the IPQ in a community of origin may be moved annually during the cooling off period.

⁹ In addition, the entity designated jointly by the City of Kodiak and Kodiak Island Borough has a right of first refusal on PQS initially allocated based on processing in communities in the Gulf of Alaska north of 56°20'N latitude.

¹⁰ The distribution of community interests differ slightly under the cooling off period and the right of first refusal. Cooling off protections operate at the borough level, if a borough exists, and, if not, at the city level. The right of first refusal entity is jointly appointed by the city and borough, if both exist, and by the applicable community government, if only one exists.

geographic distribution of processing. Changes in the distribution of processing are likely to vary with conditions in the fisheries and cannot be predicted.

Table 8. PQS regional and right of first refusal designations (2006-2007).

Fishery	Region	Community of Right of First Refusal	Number of PQS holders	Percent of PQS pool
Bristol Bay red king crab	North	St. Paul	2	2.6
		Akutan	1	19.9
	South	False Pass	1	3.7
		King Cove	1	12.8
		Kodiak	3	3.8
		None	3	2.7
		Port Moller	3	3.5
		Unalaska	11	51.1
		Total	16	97.4
Bering Sea <i>C. opilio</i>	North	None	3	1.0
		St. George	2	9.7
		St. Paul	6	36.3
		Total	8	47.0
	South	Akutan	1	9.7
		King Cove	1	6.3
		Kodiak	4	0.1
		None	4	1.8
		Unalaska	12	35.0
		Total	18	53.0
E. Aleutian Islands golden king crab	South	Akutan	1	1.0
		None	1	0.9
		Unalaska	7	98.1
Pribilof Island red and blue king crab	North	None	1	0.3
		St. Paul	5	67.3
		Total	6	67.5
	South	Akutan	1	1.2
		King Cove	1	3.8
		Kodiak	4	2.9
St. Matthews blue king crab	North	Unalaska	5	24.6
		Total	11	32.5
	South	None	5	64.6
		St. Paul	4	13.8
		Total	9	78.3
	South	Akutan	1	2.7
		King Cove	1	1.3
		Kodiak	1	0.0
		Unalaska	6	17.6
		Total	9	21.7
W. Aleutian Islands golden king crab	Undesignated	NA	9	50.0
	West	NA	10	50.0
W. Aleutian Islands red king crab	South	NA	10	100.0

Source: NMFS RAM PQS holdings 2006-2007.

Whether the current IPQ caps are binding in a manner that would be relieved by the proposed exemption cannot be determined for a few reasons. First, disclosure of individual processing levels is not permitted due to disclosure restrictions. Second, even if individual processing levels could be released, with a high cap and few participants, a processor might be substantially short of the processing cap, but still be constrained by it. For example, a processor that processes 25 percent of the IPQ in a fishery could be limited by the 30 percent cap if another processor that is processing 10 percent of the IPQ in the fishery

would choose not to have any of its IPQ custom processed, unless all 10 percent could be custom processed.

Processing practices and delivery arrangements provide some indication of the degree to which participants are using custom processing arrangements. Under the current accounting of IPQ use, an IPQ holder must establish a separate account for deliveries at any plant at which it would like to take deliveries. The current level of custom processing activity and the extent to which the cap binds is suggested by examining the number of plants actively processing IPQ and number of IPQ active holders by fishery and region in the first two years of the program (see Table 9). Custom processing arrangements are suggested by cases where the number of IPQ holders exceeds the number of plants.¹¹ This simple difference in the number of active IPQ holders and plants does not give an indication of the amount of shares that are custom processed, but simply the number of entities that may be using custom processing arrangements. Based on these differences, custom processing arrangements seem most prevalent in the Bering Sea *C. opilio* fishery, particularly in the North region, where in 2006-2007 nine IPQ holders had crab processed at three plants. Looking further, six IPQ holders received deliveries at more than one plant in that region and fishery.

In the other two fisheries that could be affected by this action, the data suggest that the current caps could be binding on participants. Specifically, four and five plants were active in the Eastern Aleutian Islands golden king crab fishery in the first two years of the program, respectively. Given that four plants must be active to comply with the current cap, it is possible that the caps could have limited consolidation in both years. Similarly, five and three plants were active in the Western Aleutian Islands golden king crab fishery in the first two years of the program, respectively. In the second year, only one plant operated in the West. Four plants are needed to fully process the IPQ allocation in the fishery – at least two of which must be in the West. Whether the exemption from the cap would have facilitated consolidation that would have resulted in full harvest of the TAC is not known.

Table 9. Active IPQ holders and plants processing IPQ landings by fishery and region (2005-2006 and 2006-2007).

Fishery	Region	2005-2006			2006-2007		
		Active IPQ holders	Active plants	IPQ holders with accounts at multiple plants	Active IPQ holders	Active plants	IPQ holders with accounts at multiple plants
Bristol Bay red king crab	North	1	1	0	1	1	0
	South	9	9	0	10	9	1
Bering Sea <i>C. opilio</i>	North	6	4	1	9	3	6
	South	8	7	1	9	6	1
E. Aleutian Islands golden king crab	South	4	4	0	5	5	0
W. Aleutian Islands golden king crab	Undesignated	2	2	1	2	2	0
	West	4	3	1	2	1	0
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	fishery closed			7	6	1
Western Bering Sea <i>C. bairdi</i>	Undesignated	7	9	4	8	6	0

Source: RAM IFQ data and RCR permit file.

Note: An IPQ holder can be active at more than one plant.

¹¹ While the difference in number of active plants and active IPQ holders suggests that custom processing arrangements are being undertaken, this difference is not determinative. In some instances, a single plant may be commonly owned with more than one entity that holds IPQ in a fishery. For purposes of this action, it is also important to bear in mind that the proposed exemption would not exempt any share holdings from the cap. In other words, all shares held by a company and its affiliates would be counted toward that company's cap.

Examining active processing accounts on a community basis reinforces the conclusion that custom processing is prevalent in the North region of the Bering Sea *C. opilio* fishery. In that fishery, the two floating processors in the North region received landings for fourteen IPQ accounts in the second year of the program.

Table 10. Number of plants processing IPQ and active IPQ holders by fishery, region, and community (2005-2006 and 2006-2007).

Fishery	Region	Community of Plant	2005-2006		2006-2007	
			Number of active plants	Number of active IPQ holder accounts*	Number of active plants	Number of active IPQ holder accounts*
Bristol Bay red king crab	North	St. Paul	1	1	1	1
	South	Akutan	1	1	1	1
		King Cove	1	1	1	3
		Kodiak	2	2	2	2
		Dutch Harbor	3	3	3	3
		Floater	2	2	2	2
Bering Sea <i>C. opilio</i>	North	St. Paul	1	1	1	1
	South	Floater	3	6	2	14
		Akutan	1	1	1	1
		King Cove	1	1	1	1
		Kodiak	1	1	1	1
		Dutch Harbor	4	5	3	7
E. Aleutian Islands golden king crab	South	Floater	1	1	0	0
		Akutan	0	0	1	1
		Dutch Harbor	3	3	4	4
W. Aleutian Islands golden king crab	Undesignated	Floater	1	1	0	0
		Adak	2	2	2	2
	West	Adak	1	2	1	2
		Floater	2	3	0	0
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	Akutan	1	1	1	1
		King Cove	fishery closed		1	1
		Dutch Harbor			3	5
		Floater			1	1
Western Bering Sea <i>C. bairdi</i>	Undesignated	Akutan	1	1	1	1
		Dutch Harbor	4	4	3	5
		King Cove	1	1	1	1
		Kodiak	1	1	0	0
		St. Paul	1	1	0	0
		Floater	2	4	1	1

Source: RAM IFQ data and RCR permit file.

*IPQ holders may have multiple accounts in an area.

2.3.4 Ex vessel pricing

Assessing ex vessel prices under the rationalization program is complicated by several factors. The two different catcher vessel owner IFQ types may bring different prices because of the different limitations on use of those shares and the effects of the arbitration program. The two different types of IFQ that are unrestricted by limits on landings (catcher vessel owner Class B IFQ and C share IFQ) could bring different prices because of the difference in negotiating leverage of their holders. Data limitations, however, complicate efforts to discern differences in ex vessel prices across the share types. The most obvious source of information for establishing such leverage would be price information from deliveries. Current data sources, however, do not provide final prices by share type. The only data that show price by share type are elandings data collected by NOAA Fisheries. These data are collected at the time of landing and do not include any post-landing adjustments or bonuses, which are reported to be an

important part of pricing under current practices. Those data suggest that, on average, B and C share landings received a premium relative to A share landings. The exception is the *C. bairdi* fishery in the first year of the program, when C shares received a lower price on landing than harvests by the other share types. Specific elandings prices are not reported here because the amount of any premium on B share and C share landings may not be accurate, since post-landing bonuses are not included in any prices.

Final price data are available for the various species harvested in the program (see Table 11). These data, however, are not collected by fishery and include catch in fisheries other than those subject to the rationalization program. Although catch from the rationalization program dominate these data, in some cases catch from other fisheries may affect final prices observed in these data. Overall, the data do show a declining price trend, which accurately characterizes price changes in recent years in the fisheries.

Table 11. Ex vessel prices by species, 2001 - 2006 (dollars/pound).

Year	Golden king crab	<i>C. opilio</i>	Red king crab	<i>C. bairdi</i>
2001	3.37	1.55	4.83	2.16*
2002	3.46	1.39	6.21	2.20*
2003	3.62	1.85	5.14	2.45*
2004	3.15	2.07	4.69	2.59*
2005	2.89	1.81	4.50	1.85
2006	2.18	1.15	3.85	1.52

* Bering Sea *C. bairdi* fishery was not open and did not contribute to this price.

Source: ADFG Commerical Operators Annual Reports

Participants in the fisheries report that the extent to which B and C share deliveries have drawn a premium varies across processors and fisheries. Some processors (including processors not holding IPQ) are reported to have paid bonuses to attract deliveries of B share harvests. Participants report that premiums for B and C share deliveries are typically a few cents, but have ranged as high as approximately ten cents. Some processors have chosen not to compete for landings of B share and C share harvests, but have accepted deliveries of B and C share harvests at the same price as A share landings.¹² Under these circumstances, the B and C share harvests received by the processor have typically come from the same fleet delivering A share harvests. In some cases, B and C share deliveries are reported to have brought lower prices than A share deliveries. This conclusion would appear to be supported by the average reported price in elandings data for C share deliveries in the *C. bairdi* fisheries, which was lower than the average reported price for A share deliveries in the first season.

Any absence of a substantial premium on B and C share landings in the program to date could be explained by a few factors other than the utility of those unrestricted shares serving their purpose as competitive market shares. In the first two years of the program, crab markets have been at some of their lowest levels in recent years. In such a market, it is possible that the difference between a competitive

¹² Some participants have suggested that processors are reluctant to bid up the price for B shares in part because they fear that arbitrators may simply equate A share ex vessel prices with B share ex vessel prices.

price and the price arrived at through the arbitration standard is relatively small. Even in better markets, it is possible that the standard, under which the historic division of revenues is a primary consideration, would result in a price similar to the competitive price. Those historic prices were determined in a competitive market, but one under a different management structure that may have affected the distribution. In addition, some harvesters are reported to have used B and C shares to realize efficiencies in harvesting. B and C share harvests have supplemented a partial delivery of A shares to limit the need for an additional trip to harvest (and independently market) the B and C share catch. Also, when making A share harvests, some harvesters avoid trips that do not fully harvest the available IFQ allocation and that would require an additional trip, knowing that if the total amount of A shares available are exceeded, B and C shares can be used to cover any A share harvest overage. These uses of B and C shares clearly benefit harvesters, but detract from the use of B and C shares to pursue competitive markets.

2.3.5 First wholesale and consumer markets

This section briefly summarizes market conditions in the first two years of the program and the expected market condition in the coming year using the market report produced for participants in the arbitration system. A brief summary of recent first wholesale prices is also included.

Crab markets in general suffer from great volatility. In general, the red king crab market and prices are greatly influenced by Japanese demand, U.S. demand, and Russian production. In the first year of the program (2005), the Russian supply of red king crab increased substantially, pushing prices down substantially. In the second year, a drop in Russian production and a more aggressive Japanese market buoyed prices of red king crab. That recovery in prices has continued to date and is expected to continue (Sackton, 2007a).

Like red king crab prices, prices for *C. opilio* (snow crab) are greatly influenced by Japanese demand and U.S. demand. In the *C. opilio* market, however, the primary competition in production is the east coast of Canada. In the first year of the program, prices for *C. opilio* reached extremely low levels due to poor demand in both the Japanese and U.S. markets. In the second year, the price recovered, approaching all time highs stimulated in part by demand from buyers drawn to the snow crab market by the low prices in the preceding year. In the coming year, it is possible that prices could decline significantly particularly from build up of Canadian inventories or if sellers of crab appear to eager to sell their product. *C. bairdi* prices have generally tracked closely with *C. opilio* prices, with *C. bairdi* drawing a premium over *C. opilio* (Sackton, 2007c).

In the first year of the program, Aleutian Islands golden king crab prices declines substantially, tracking the price for red king crab products. In the second year an abundance of competing small sized red king crab imports further weakened prices. Going into the third year of the program it is thought that the price could remain at a lower level because the demand for golden king crab does not seems to have increased substantially. Overall, the increase in demand for crab products is expected to result in either stable or perhaps slightly rising prices for golden king crab in the coming year (Sackton, 2007b).

First wholesale prices for red and golden king crab show a notable decline in 2005, the first year of the rationalization program (Table 12). The price drop is not evident for *C. opilio*, likely because that fishery is prosecuted early in the year, so these data reflect prices for production from the January 2005 fishery.

Table 12. First wholesale prices of crab species (2001-2006).

Species	2000	2001	2002	2003	2004	2005	2006
Golden king crab	7.20	6.95	7.58	7.89	6.02	6.00	4.35
Red king crab	9.11	8.93	11.58	9.82	9.25	8.52	7.49
<i>C. opilio</i>	4.16	3.73	3.58	4.40	4.79	3.85	2.89
<i>C. bairdi</i>	5.83	5.12	5.22	6.13	6.60	4.37	3.94

Source: COAR data

2.3.6 Communities

Several communities have historically been home to processors that have taken delivery of crab from the Bering Sea and Aleutian Islands crab fisheries. Limited information concerning the geographic distribution of processing in the crab fisheries can be released because relatively few processors participate in the fishery in any location. In the years preceding implementation of the rationalization program, only data from the Bristol Bay red king crab and the Bering Sea *C. opilio* fisheries can be released (see Table 13). In addition, activity on floating processors may be associated with a particular community, but is not attributed to that community in these data. Dutch Harbor processors received slightly less than a majority of the landings in both fisheries. Discerning the landings of any other community in isolation is difficult because of aggregations required by confidentiality rules.

Table 13. Distribution of processing in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries prior to the rationalization program (2001-2005).

Fishery	Year	Communities	Number of processors	Pounds processed*	Percent of processed pounds
Bristol Bay red king crab	2001	Adak, Akutan, King Cove, Floaters	6	2,663,437	34.7
		Dutch Harbor	5	3,902,545	50.8
		Catcher processors	6	312,939	4.1
		Kodiak	6	798,932	10.4
	2002	Akutan, King Cove, Floaters	6	3,372,188	38.5
		Dutch Harbor	6	4,276,910	48.8
		Catcher processors	8	300,425	3.4
		Kodiak, St. Paul	4	820,497	9.4
	2003	Akutan, King Cove, Sand Point, Floaters	10	5,207,419	36.6
		Dutch Harbor	7	7,131,382	50.1
		Catcher processors	8	680,080	4.8
		Kodiak, St. Paul	5	1,218,494	8.6
	2004	Akutan, St. Paul, King Cove, Floaters	7	5,932,888	42.7
		Dutch Harbor	6	6,504,531	46.8
		Catcher processors	8	602,749	4.3
		Kodiak	4	848,879	6.1
Bering Sea <i>C. opilio</i>	2001	Akutan, King Cove, Kodiak	3	1,889,513	8.2
		Dutch Harbor	5	7,916,618	34.5
		Catcher processors	7	3,099,567	13.5
		St. Paul, Floaters	8	10,034,268	43.7
	2002	Dutch Harbor, King Cove, Kodiak	9	13,646,381	46.1
		Catcher processors	8	1,671,036	5.6
		St. Paul, Floaters	8	14,292,205	48.3
	2003	Akutan, King Cove, Kodiak	3	2,162,245	8.5
		Dutch Harbor	6	10,308,648	40.6
		Catcher processors	5	803,452	3.2
		St. Paul, Floaters	8	12,135,777	47.8
	2004	Akutan, King Cove, Kodiak	4	2,287,481	10.4
		Dutch Harbor	6	8,714,351	39.7
		Catcher processors	6	664,660	3.0
		St. Paul, Floaters	8	10,273,001	46.8
	2005	Akutan, King Cove, Kodiak	3	2,206,008	9.7
		Dutch Harbor	6	9,759,358	43.1
		Catcher processors	6	648,967	2.9
		St. Paul, Floaters	5	10,041,444	44.3

*Excludes deadloss.

Source: ADF&G fish ticket data

Rights of first refusal are granted to all communities with crab processing in recent history (see Table 8). The distribution of these rights is a starting point for the distribution of landings in communities in the various fisheries.

Below, seven Alaska communities with direct links to the BSAI crab fishery are profiled. These communities are Unalaska, Akutan, King Cove, St. Paul, St. George, Adak, and Kodiak. 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 fishery 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. In addition, the community of Atka is profiled, as that community could directly benefit from the provisions of this action.

2.3.7 Unalaska

Commercial fishing and seafood processing play a significant role in the economic success of Unalaska. The community is home to the greatest concentration of processing and catcher vessel activity than any other Alaska community (EDAW, 2005). As a result, commercial fishing and seafood processing provide a significant number of jobs and income to the community. For example, the four largest employers in Unalaska are UniSea, Inc., Westward Seafoods, Alyeska Seafoods, Inc., and Royal Aleutian Seafoods, Inc.

Pollock accounts for nearly 70 percent of the total wholesale value processed in Dutch Harbor in 2005. The second largest contributor to total wholesale value processed in Dutch Harbor is crab at nearly 20 percent. Of the crab species, red king crab provided the largest contribution at \$51 million in 2005 followed by snow crab at \$33 million.

Dutch Harbor based processors received a substantial share of the processor share 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.

Dutch Harbor is also home to a residential fleet, but it is much smaller than the fleets of some other fishing communities within the same region. The local fleet tends to target cod, halibut, and crab fisheries on a small scale. In recent years participation in the BSAI crab fisheries by the Unalaska small boat fleet has diminished. Several of the crab fisheries in the surrounding area have closed, thus participation has diminished significantly. The Tanner crab fishery has been closed since 1994 and king crab since the early 1980s. In 2004, the Eastern Aleutian District local Tanner crab fishery reopened after a decade of closure. Several vessels that participate in that fishery are owned by Unalaska residents, but the restriction of 300 pots may limit the number of vessels that participate in the fishery (EDAW, 2005).

Unlike many of the crab ports in the region, Unalaska also has extensive support services for the Bering Sea fisheries. The support services provided in Unalaska can support all range of services for any vessel class in the pollock, crab, and other groundfish fisheries. As a result, the support services are heavily dependent upon the success of the groundfish and crab fisheries. To some extent, the fleet services also contribute to the diversification of the Unalaska economy which insulates the community from negative changes in individual fisheries.

In summary, the community of Unalaska is more economical diversified compared to other crab ports in the region, but is still heavily dependent on the groundfish and crab fisheries in the North Pacific. As noted above, the pollock fishery is the most important fishery resource for the community, contributing

nearly 70 percent of the total value of processed groundfish followed by crab at 20 percent of the total value of processed product.

2.3.8 King Cove

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, the only shore based processor located in the community. The plant processes salmon, crab, halibut, and groundfish. Approximately 80 percent of King Cove's work force is employed full time in the commercial fishing industry (EDAW, 2005). This likely underestimates the dependency of the local economy on the importance of commercial fishing in the community.

Unlike Dutch Harbor, detailed production figures cannot be disclosed because of confidentiality restrictions. In general, King Cove is more dependent upon Pacific cod than pollock, which contrasts with Unalaska and Akutan. For several years now, the amount of crab and the total value of the crab processed in King Cove have been declining, while groundfish has increased. The decline in crab production was due primarily to a decline in quotas related to reduced stocks. In addition, AFA sideboard caps on BSAI crab have also limited the amount of crab that can 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.

The local residential fleet primarily participates in the salmon fishery, with some participation in the Pacific cod fishery. With regard to crab, King Cove is home to one large crab vessel and three smaller crab vessels, although the smaller vessels have not been active in recent years. The community is also home to several crab vessels that are owned by non-residents. It is reported that one non-resident owner keeps four Bering Sea crab vessels in King Cove. Two of those vessels are skippered and crewed by King Cove residents, while the other two vessels have outside skippers but King Cove crews (EDAW, 2005). In addition, a number of crab vessels spend time in King Cove before and after the crab season. Thus, while only one locally owned vessel fishes in the crab fishery, the community is still heavily dependent upon the BSAI and GOA crab fishing for employment and income.

Rapid fleet contraction under the Program, particularly in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, has affected King Cove. Between 10 and 15 crew jobs are estimated to have been lost in each of these two fisheries. 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 on 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).

2.3.9 Akutan

Similar to King Cove and Unalaska, the economy of Akutan is heavily dependent upon the groundfish and crab fisheries in the BSAI and GOA. The community is home to a 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, unique from King Cove and Unalaska, 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 and also provides for a significant amount of the processing value at the plant (EDAW, 2005). 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.

A small number of Akutan residents do participate in the groundfish and crab fishing industry as crew members. Two residents work the IFQ black cod fishery and six individuals work the king and snow crab fisheries.

The community is also an eligible CDQ community, which benefits from the allocation of BSAI groundfish and crab TAC to the CDQ program. APICDA, which represents the community of Akutan and 5 other communities, has participated in the crab fishery through purchasing partial ownership in two crab harvest vessels, the Golden Dawn and the Farwest Leader (EDAW, 2005). In addition, APICDA also has significant investments in both harvesting and processing sectors of the BSAI fisheries.

2.3.10 Kodiak

Although the economy of Kodiak is more diversified compared to King Cove and Akutan, fishing is a significant player in the community. Excluding the USCG, four of the top ten employers in Kodiak in 2003 were fish processors.

Salmon and herring account for 42 percent of the total wholesale value during 2005. Halibut, sablefish, and other groundfish contributed 22 percent of the total wholesale value, while Tanner crab contributed less than 5 percent of the total wholesale value.

Unlike Unalaska, King Cove, and Akutan, Kodiak is home to an extensive resident fishing fleet. The total number of vessels is less than 600, with less than 300 that actively fished in 2002. Total estimated gross revenue of Kodiak permit holders was \$111 million for 2002.

Kodiak is also home to numerous shore based processors. Species that typically contribute more than 10 percent of the total value are Pacific cod, pollock, and salmon. The processors located in Kodiak provide a large amount of diversity in size, volume, and species processed. The products produced by the shore plants range from large quantity canning of salmon to fresh and fresh-frozen products.

Finally, Kodiak provides a wide range of support service business that caters in whole or in part to the commercial fishing industry. As a result, the support services are heavily dependent upon the success of the different fisheries. To some extent, the fleet services also contribute to the diversification of the Kodiak economy which insulates the community from negative changes in individual fisheries.

The rapid fleet contraction under the crab rationalization program is also thought to have affected Kodiak. Kodiak crew are estimated to have lost 125 positions in the Bristol Bay red king crab and approximately 60 positions in the Bering Sea snow crab fishery in the first year of the program. 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).

2.3.11 St. Paul

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. The community of St. Paul also participates in the Western Alaska CDQ Program under the Central Bering Sea Fishermen's Association and receives an allocation of crab under that program. Since 1992, the local shoreplant on St. Paul has been the primary processor for crab. As noted above, a number of floating processors have also frequented the area. Icicle, Norquest, Trident, and Stellar Seafoods own floaters that have recently processed crab in the Pribilof Islands. Other processors also have used floaters to process crab in and around St. Paul over the years. Further description of the processing activity in the Pribilof Islands area cannot be included in the profile due to data confidentiality restrictions.

During 1991 to 2000, snow crab accounted for 74 to 100 percent of the relevant BSAI crab processing in the northern region. During this same period, the northern region accounted for approximately 31 percent of the total processing value of the fishery. For the period 1995-1999, the northern region accounted for 43 percent of the total processing value of the fishery. The sharp decline in the GHL from 1999 to 2000 resulted in a drop in the harvest and drop in the percentage of the total snow crab processed in the northern region, from 49 percent in 1999 to 18 percent in 2000. Overall, the decline in snow crab stocks during that period had a disproportional effect on the community of St. Paul compared to other communities that process snow crab.

The shift away from St. Paul to other communities during this downturn in snow crab stock is estimated to be due to the slow down in fishing pressure during that period. Data from interviews with harvesters suggest that shorter seasons (and/or lower harvest levels), among other factors, have resulted in a higher proportion of crab being taken further from the grounds (away from St. Paul) for processing.

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.

2.3.12 St. George

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. Snopac Seafoods, the most consistent processor in the community, has a bunkhouse that it uses for housing non-resident processing workers, who work on their floating platform. St. George is also home to Puffin Seafoods, a small fish handling facility that purchases halibut from the local fleet. These landings are typically tendered to St. Paul for processing at its shore plant. Like Akutan, St. George is an eligible CDQ community represented by APICDA. Puffin Seafoods has been in business since 1998 and is a joint venture between APICDA Joint Ventures and St. George Fishermen's Association.

Approximately 10 commercial fishing permits are issued to residents of St. George and approximately 10 residents own vessels. Residents are engaged exclusively in the fixed gear fisheries, primarily for halibut.

Since 2000, little or no crab processing has taken place in St. George. Prior to the rationalization program, the loss of processing activity is 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 has prevented deliveries to the community during the first two years of the program. Whether the community can attract crab landings in the future depends in large part on its ability to provide a harbor perceived to be safe by participants.

2.3.13 Adak

The community of Adak, until recently, had no direct or indirect ties to commercial fishing because the island was home to a Naval Air Station since the 1940s. However, the U.S. Navy closed the air station several years ago, leaving the island to the local residents. As a result, the Aleut Corporation is trying to transform the island into a commercial fishing center in the Western Aleutians area of the Bering Sea.

Most commercial fishing deliveries to Adak are to a single processing plant from larger vessels from outside the area since the community has a very limited small boat residential fleet. Of the species processed, cod, halibut, and black cod are the primary species. The community has also seen some crab and cod activity related to other companies, but these companies are not physically located in the community. Further description of the processing activity in the Adak area cannot be included in the profile due to data confidentiality restrictions.

Finally, Adak is in the process of developing support services capabilities for the commercial fishing fleet. The port facilities in Adak can also support a wide variety of large vessels. At-sea processors have used the port for transfer of product in addition to a supply stop.

A few aspects of the rationalization program are structured specifically to support Adak. First, ten percent of the TAC in the Western Aleutian Islands golden king crab fishery is allocated to a community entity representing Adak. This allocation is intended to support fishery development (including both harvesting and processing) in the community. Adak is also an intended beneficiary of a regional designation on one-half of the shares in the Western Aleutian Islands golden king crab fishery, which require crab harvested with those shares to be processed west of 174° West longitude. Currently, Adak is the only community in the West region with a shore-based crab processing plant. Processing of the West region allocation in Adak is not a certainty, since the rules in the fishery permit processing of those landings on floating processors.

2.3.14 Atka

The community of Atka is the western most fishing community in the Aleutian chain. The economy of Atka is primarily based on subsistence, with support from commercial fishing. As of 2000, three residents owned federally licensed fishing vessels and 19 residents were licensed as crew. The community has a small shore-based processor, Atka Pride Seafoods, which takes delivery of halibut and sablefish, mostly from the local fleet. In addition to fishing activity of the local fleet, some vessels have used Atka as a location to make crew changes. Although Adak was intended as the primary beneficiary of regionalization of the Western Aleutian Islands golden king crab fishery in the crab program, the Council was aware that Atka would be positioned to benefit from the regionalization of that fishery, either through processing at the local shore plant (if the plant develops adequate processing capacity) or through processing on floating processors within the community’s boundaries.

2.4 Analysis of alternatives to exempt custom processing in certain fisheries and regions from the processing share cap

The analysis is separated into two parts. The analysis of the fishery and region custom processing exemptions is presented first. The analysis of the provisions exempting processing in the community of origin from use caps follows.

The effects of the two alternatives depend on the specific options selected by the Council. At the most general level, the effects will vary depending on the fisheries and regions that the Council elects to apply the custom processing exemption to. The analysis begins by assessing the basic operational effects of applying the exemption to the various fishery and region options.

The scope of the exemption granted will also influence these operational effects. Options under consideration define the eligibility of entities for the exemption based on the definition of custom processing and the location of the custom processing activity. The analysis examines how the scope of the exemption differs under the different options, explaining how these effects differ across fisheries and regions. The analysis also examines the effect of the facility cap that could be applied to two of the fisheries.

After operational effects are fully discussed, the analysis goes on to describe the effects of the various options on different factors of interest to the Council, including processor efficiency, harvester efficiency, addressing contingencies in the fishery, harvest of the TAC, and community sustainability.

2.4.1 Fisheries and Regions

Processing share use caps under the program apply to two different activities. First, the caps limit the extent of processor share holdings. Second, the caps limit the extent to which any processor can physically process crab at its facilities. This action will not affect share holdings limitations of the use cap, but could remove (or partially remove, depending on the definition of the exemption) the limits on physical processing. In either case, the effect of the current 30 percent cap is that processing in a fishery (or region) cannot be consolidated into a single facility through custom processing arrangements. (see Table 14). Under an exemption for custom processing from IPQ use cap calculations, in fisheries without regional landing requirements, all processing in the fishery could be consolidated into a single facility. In fisheries with regional landing requirements, processing could be consolidated into a single plant in the region. The amount of the cap in pounds varies across fisheries with TACs and allocations to catcher processors, which reduce the allocation of IPQ in the fishery (see Table 15).

Fisheries and Regions (preferred alternative in bold):

Custom processing will be exempt from use caps in the following regions and fisheries:

The North region of the Bering Sea *C. opilio* fishery (analyzed here for regulation change from MSA reauthorization – not optional)

Option 1) the Western Aleutian Islands golden king crab fishery,

Suboption 1: only West designated shares

Suboption 2: West designated or Undesignated shares processed in the West region

Option 2) the Western Aleutian Islands red king crab fishery,

Option 3) the Eastern Aleutian Islands golden king crab fishery,

Option 4) the St. Matthew Island blue king crab fishery, and

Suboption: North region only

Option 5) the Pribilof Islands red and blue king crab fishery

Suboption: North region only

Table 14. Number of processing plants that must process IPQ landings in each fishery and region based on current caps.

Fishery	Remote region in the fishery	Number of processors required	
		in the remote region	in the fishery
Pribilof red and blue king crab	North	3	5
St. Matthews blue king crab	North	3	4
Western Aleutian Islands red king crab	NA	NA	
Eastern Aleutian Islands golden king crab	NA	NA	
Western Aleutian Islands golden king crab	West	2	
Bering Sea <i>C. opilio</i>	North	2	

Source: NMFS RAM PQS allocations (2006-2007).

Table 15. IPQ processing limits under the current processing cap by fishery based on the most recent TAC and percent of IPQ and IPQ pounds designated for landing in the remote region by fishery based on the most recent TAC.

Fishery	Most recent opening				Remote region		
	Year	TAC	IPQ allocation	IPQ cap	Designation	Percent of IPQ	IPQ in pounds
Pribilof red and blue king crab	1998	1,250,000	1,081,845	324,554	North	67.5	730,246*
St. Matthews blue king crab	1998	4,000,000	3,411,354	1,023,406	North	78.3	2,671,090*
Western Aleutian Islands red king crab	2003 - 2004	500,000	265,239	79,572	None	NA	NA
Eastern Aleutian Islands golden king crab	2006 - 2007	2,700,000	2,245,273	673,582	None	NA	NA
Western Aleutian Islands golden king crab	2006 - 2007	2,430,000	1,140,180	342,054	West	50.0	568,432
Bering Sea <i>C. opilio</i>	2006 - 2007	32,909,400	26,064,813	7,819,444	North	47.0	12,231,916

Source: Crab SAFE, 2006; NMFS RAM PQS holdings (2006-2007); NMFS RAM QS holdings (2006-2007).

* Estimated based on most recent TAC and QS and PQS allocations.

The effects of the current caps vary across fisheries with regional definitions and the division of shares across regions. In the Pribilof red and blue king crab fishery, slightly more than two-thirds of shares are designated for use in the North region. Since the current cap effectively prevents any processor from processing in excess of 30 percent of the crab in the fishery, the cap requires a minimum of three processors to operate in the North region and a minimum of two processors to operate in the South. Based on the most recent TAC in the fishery, each processor would be limited to processing approximately 325,000 pounds of crab. On average, the plants in the North would be processing approximately 240,000 pounds of crab, while plants in the South would average approximately 150,000 pounds of crab. Depending on the distribution of shares within the plants, it is possible that a single company could operate one plant in the North and another in the South, but a minimum of 4 companies would need to have active plants in the fishery to remain within the cap. Adoption of the exemption in the North would allow consolidation of processing in the North in a single facility, which could process approximately 750,000 pounds, based on the most recent TAC. Applying the exemption to the South also would allow approximately 270,000 pounds to be processed at a single plant.

In the St. Matthew Island blue king crab fishery, the cap compels at least 3 plants to operate in the North region, each of which would be limited to processing approximately 1 million pounds of crab. The regional distribution of shares allows consolidation of processing in a single plant in the South without reaching the constraint of the cap. Exemption of custom from the cap would allow consolidation of North processing in a single plant, which could process approximately 2.6 million pounds, based on the most recent TAC. Applying the exemption to the South is less important in this fishery, since the cap does not limit physical processing in the South; however, applying the exemption in the South could allow a processor with substantial share holdings in the fishery to consolidate additional custom processing activity in a South plant. In the absence of the South exemption, that processing could be consolidated, but not in a plant owned by a processor with North share holdings that approach the 30 percent cap.

Since regional landing requirements do not apply to the Western Aleutian Islands red king crab fishery, the exemption would simply permit consolidation of processing activity beyond the current cap. The current cap limits a plant to processing approximately 80,000 pounds of crab. Exemption of custom processing from the current cap would allow the entire IPQ allocation in the fishery to be processed in a single plant.¹³ Although this consolidation may seem excessive, the estimated 265,000 pound IPQ allocation in the fishery is less than the IPQ cap in all other fisheries based on current TACs.

The Eastern Aleutian Islands golden king crab fishery also has no regional landing requirements. The current cap requires at least four processors to operate in the fishery, none of which may process in excess of approximately 700,000 pounds of crab based on the most recent TAC in the fishery. The exemption could allow consolidation of all IPQ processing in the fishery (approximately 2.3 million pounds) in a single facility.¹⁴

In the Western Aleutian Islands golden king crab fishery, the current cap requires two facilities to operate in the West region and at least four processing facilities to operate in the fishery. No single plant could process in excess of approximately 350,000 pounds of crab from the fishery. The exemption would allow consolidation of all processing of West designated shares (half of the IPQ in the fishery) in a single facility. In addition, any processing of undesignated shares (the other half of the IPQ in the fishery) could be consolidated in a single facility. Since the undesignated shares can be processed in any location, all processing in the fishery could be consolidated in a single facility in the West, if the Council chooses to apply the exemption to all shares in the fishery. A processing plant in the outside of the West region (east of 174°W longitude) would be limited to processing the half of the fishery made up of undesignated shares.

One of two suboptions could be used to limit the scope of the exemption to certain processing in the West region in this fishery. Under the first suboption, the exemption would apply only to processing of shares that are designated for processing in the West region only. Under this suboption, applying only to West designated IPQ, a plant could process all West designated IPQ, and could process additional undesignated shares provided the sum of 1) its share holdings of either designation and 2) its custom processing of undesignated shares, does not exceed the 30 percent cap. So, if the cap exemption is applied only to custom processing of West designated IPQ, at least two facilities would be required to operate in the fishery, neither of which could process in excess of 60 percent of the undesignated IPQ allocation. Under the second suboption (which is included in the preferred alternative), the exemption would apply to any processing in the West region (including any West designated and Undesignated shares). Under the second suboption, all custom processing that takes place in the West region could be exempt from the cap, allowing the entire IPQ allocation in the fishery to be processed in a single plant, provided that the plant meets any other requirements for the exemption. Applying the exemption to any processing in the West could facilitate additional processing of undesignated shares in the West.¹⁵

¹³ The options include an option to limit processing at a single facility to 60 percent of the IPQ allocation in the fishery.

¹⁴ As in the Western Aleutian Islands red king crab fishery, an option could limit processing at a single facility to 60 percent of the IPQ allocation in the fishery.

¹⁵ It should be noted that one PQS holder is grandfathered at a level above the current cap in the Western Aleutian Islands golden king crab fishery. That processor can process all of its IPQ at its facilities without violating the cap. Since its allocation is split between undesignated and West shares, it could process all of its IPQ in a West facility. If it did so, it is possible that only two other plants would need to be operated in the fishery, one in the West and one in any other location.

2.4.2 Definition of custom processing

The second aspect of the exemption that the Council needs to define in this action is the definition of custom processing. The options identified by the Council propose two possible definitions of custom processing. Under the first definition (which is included in the preferred alternative), the exemption would apply to any processing undertaken by any entity other than the share holder (effectively disregarding physical processing when applying the cap). Under this approach, only a person's share holdings (direct and indirect) would be considered when applying the cap. Defining the cap in this manner would simplify management of the cap, by allowing the agency to consider only share holdings, avoiding the need to collect and assess plant ownership information when applying the cap. Such an approach could be used by processors to use more creative ownership structures and risk sharing in fisheries and areas subject to the cap.¹⁶ Under such an arrangement, a plant could be owned and operated by two distinct share holders, with each share holder credited only with its own share holdings for purposes of applying the cap.

Definition of custom processing exemption (preferred alternative in bold):

Option 1) Physical processing of crab at a facility owned by an entity does not count toward the cap of the entity (only processor share holdings count toward an entity's cap).

Option 2) Custom processing is the processing of crab received with IPQ that has 50 percent or less common ownership with the processing plant.

An alternative approach would be to only exempt processing at a plant at which the share holder owns less than a threshold percentage interest – 50 percent common ownership is specified in the Council's option. Under this approach, if the plant ownership is 50 percent or greater in common with the share holding ownership, the processing would count against the cap of any entity that is determined to be an affiliate of the plant owner. The need or benefit of considering common share and plant ownership when granting the exemption is not obvious. One possible justification could be that such an arrangement would not be consistent with limits of antitrust law. Although an antitrust violation would certainly justify not allowing a common ownership arrangement, the Council has typically left definition and review of antitrust matters to the Department of Justice Antitrust Division. Limiting the exemption to cases of distinct ownership of shares and the processing plant could be justified, if the Council perceived a threat to markets from such an ownership arrangement that would be distinct from concerns addressed by antitrust laws.

An additional complication arising from limiting the exemption to cases of distinct share and plant ownership is the need to gather and assess ownership data to implement the provision. Although the processing sector has few participants, ownership data are often complicated and cumbersome to decipher. Interpretation of ownership records would complicate administration of the provision.

2.4.3 Platforms eligible for the exemption

The third aspect of the exemption that the Council must define is whether the exemption applies to all plants, or only plants operated in certain locations. The MSA provision creating an exemption in the North region of the Bering Sea *C. opilio* fishery applies only to processing that occurs at a shore-based

¹⁶ Any such coordinated arrangement would need to fully comply with any requirements and limitations of antitrust law, regardless of the rules governing application of the caps.

plant or at a plant that is moored in a harbor. The Council has identified three options for defining a plant's eligibility for the exemption.¹⁷

Locations qualified for the exemption (preferred alternative in bold):

Custom processing will qualify for the exemption provided that processing is undertaken in the applicable fishery and region at:

Option 1) a shore plant

Option 2) a shore plant, or a floating processor that is moored at a dock or docking facilities (e.g. dolphins, permanent mooring buoy) in a harbor in a community that is a first or second class city or a home rule city, except for the community of Atka, where a floating processor may anchor at any location, provided that it is within the municipal boundary.

Option 3) any shore plant or floating processor

Exempting only shore plants could be used to benefit those plants that have the strongest locational ties. These plants could provide community benefits through resident processing crews and support facilities. The extent of these benefits will vary across communities and facilities. Applying the exemption to shore plants only would provide owners of existing shore plants with a much stronger position in the market by limiting the ability of floating processors to compete on the same terms (i.e., they could compete, but would not have the advantage of the cap exemption). For the owner of a floating processor to compete on equivalent terms with an existing shore plant would require the capital investment to develop a crab processing shore plant in the region. Compelling the development of additional shore facilities to induce competition would seem inconsistent with development of efficiencies in processing, one of the stated rationales for the exemption. The development of these facilities, however, would be consistent with the rationale of providing community benefits. The magnitude of these effects differs across fisheries and regions with the number of shore plants.

In the North region, only the shore plant at St. Paul currently processes crab from any of the rationalized fisheries. If the exemption is applied to processing in the Pribilof red and blue king crab fishery, or St. Matthew Island blue king crab fishery, the St. Paul shore plant could gain a substantial advantage relative to other processors under an exemption that extends only to shore plants. Likewise, in the West region of the Western Aleutian Islands golden king crab fishery, the plant at Adak could be provided a substantial advantage relative to other processors, if only shore plants are qualified for the exemption.

Extending the exemption to floating processors “moored in a harbor at a dock or docking facility” (as included in the preferred alternative) could allow additional competition, while deriving or preserving some of the community benefits from the exemption. Although workers at a floating plant are likely to spend less time on shore and in local facilities than shore plant workers, these floating processor workers are likely to occasionally frequent local businesses. The narrow definition, which requires use of a dock or docking facility to qualify for the exemption, is likely to ensure some use of local services by both the processing platform and its employees.¹⁸ In considering this option, the Council should identify communities that qualify for the exemption (see Figure 1).

¹⁷ It should be noted that only one of the definitions is consistent with the MSA exemption applicable to the Bering Sea *C. opilio* fishery. That option would apply the exemption to custom processing in a first or second class city or home rule city at a shore plant or floating processor that is moored in the harbor at a dock or docking facility.

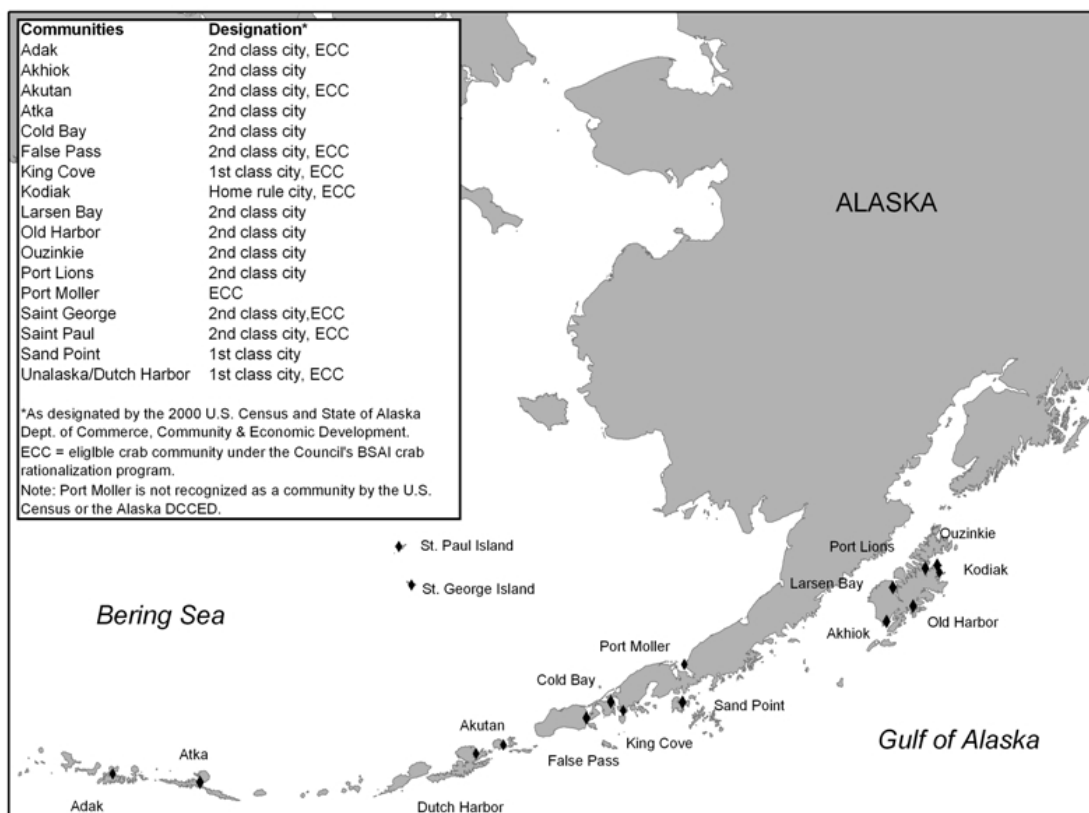
¹⁸ In its enforcement guidance letter concerning to the MSA exemption of custom processing from processing use caps in the North region of the Bering Sea *C. opilio* fishery, NOAA GC defined “moored within the harbor” as being within the harbor of St. George or St. Paul shown on navigation charts. The definitions suggested by this option seem to better parallel community interests of concern to the Council.

Although processing in several cities would qualify for the exemption, as defined by this option, the most likely locations for processing to occur in excess of the current cap are those communities that currently participate in the program. These communities are closest to the crab fishing grounds and are most likely to provide the production efficiency benefits to processors that would lead to consolidation under the exemption. Most of these communities were eligible for either rights of first refusal or ‘cooling off’ provision protections, under the program at the time of implementation. Beyond the “eligible crab communities,” it is possible that some consolidation could occur at Atka, in the event that either its shore plant developed crab processing capacity, or a floater was used in that community.

Applying the exemption to any processing in the community of Atka (as proposed under the preferred alternative) could provide an advantage to that community, by allowing a floating processor anchored within the community boundaries to process above the caps under the exemption. The rationale for this extension of the exemption is to support increased processing in that community, without requiring the community to incur the costs of dock or moorage development. It is possible that, if a processor chooses to process in the community with some regularity, that processor will choose to either develop the shore plant’s capacity to handle crab or install docking or moorage that will support a processing vessel. Allowing the exemption prior to the development of an onshore facility or adequate docking or mooring facilities could contribute to the development of those facilities in the community in the long run.

If the Council’s primary objective is to allow greater flexibility in consolidation of processing, it could adopt the third option, under which the exemption would apply to custom processing regardless of whether the processing is on a floater or within community boundaries. This provision could provide processors with greater flexibility in locating floating platforms, but may sacrifice some community benefits that could arise under a more restrictive exemption.

Figure 1. Cities by type in the Bering Sea, Aleutian Islands, Alaska Peninsula, and Kodiak Island.



2.4.4 Facility cap

The Council has also included options to impose a cap on processing at any one plant or facility in the Eastern Aleutian Islands golden king crab and the Western Aleutian Islands red king crab fisheries. Since the PQS allocation in both of these fisheries is all designated for processing in the South region, it is possible that all processing could be undertaken at a single plant, in the absence of a facility (or plant) cap. Since 98 percent of the PQS in the Eastern Aleutian Islands golden king crab are subject to rights of first refusal in Unalaska, that is the most likely location for consolidation in that fishery under the exemption. Allocations in the Western Aleutian Island red king crab fishery are not subject to rights of first refusal. Historically, most processing in that fishery has also taken place in Unalaska. In excess of 90 percent of the processing shares in the fishery are held by entities with Unalaska processing facilities.

Facility cap (preferred alternative in bold)

Outside of the West region, no facility may process more than 60% of

- a) EAI golden king crab
- b) WAI red king crab

Given the concentration of processing activity in these two fisheries in Unalaska, it is possible that exempting custom processing from the cap in the fishery could result in consolidation of all (or almost all) processing in the fisheries in a single facility in Unalaska. This option would allow the Council to

prevent the consolidation of more than 60 percent of the IPQ in a single facility outside the West. Processors in the West region (west of 174°W longitude) would be exempt from the cap. The rationale for exempting processors in the West is that those communities have substantially less economic (and processing) activity. If a processor in the West region were able to provide a competitive arrangement that could attract in excess of 60 percent of the processing in one of these fisheries, allowing that activity could stimulate economic activity, providing community benefits.

2.4.5 Effects on the processing sector

The extent to which any exemption of custom processing from share caps is used depends on whether processors choose enter custom processing arrangements. The choice to enter those arrangements will depend largely on the benefit to the share holder arising from using the shares at its own facility or custom processing at a plant that does not exceed the cap in comparison to the benefit of having the shares custom processed by an entity that is over the cap.

One of the potential benefits of this action is an improvement in processor production efficiency. Under the status quo, the cap binds only if custom processing precluded by the cap prevents processor production efficiency gains from being achieved. Processors are unlikely to engage in custom processing under the exemption from the cap, unless they can achieve gains through that consolidation. The benefits from consolidation could also have distributional impacts within the sector. For example, consolidation of processing at a single facility, beyond the cap, will redistribute landings from other facilities to the processor exceeding the cap. In some cases, the share holder contracting for custom processing will be the operator of the facility losing the processing activity. In this case, it is difficult to argue that the plant owner suffered any loss from the cap exemption. In other cases, the removal of the cap will be a redistribution of custom processing activity from one plant to another. In this case, the redistribution of activity will have a processing efficiency benefit for both the share holder and the facility receiving the exemption; however, the movement of custom processing activity that gives rise to those benefits will result in a loss to the facility that loses custom processing.

Several factors other than processing efficiency could influence the extent to which processing would be consolidated under the exemption, and its effects on the processor sector. First, processors must be able to reach an agreement on price of custom processing. In some instances competition within the sector could diminish consolidation, if a processor perceives a benefit from keeping its processing independent. Some processors may wish to attempt to develop new products, which might not be possible (or as advantageous) under custom processing arrangements. Given that the proposed exemptions do not apply to all fisheries or regions, it is likely that product development efforts would not curtail consolidation under the exemption – ample landings exist that could be used for product development in other fisheries and regions. In addition, product development is least likely to occur in remote regions with less access to the markets. Only in three small fisheries (i.e., Western Aleutian Islands red king crab, Western Aleutian Islands golden king crab, and the Eastern Aleutian Island golden king crab fisheries) is the exemption being considered for less remote areas. Given these factors, the potential for consolidation under the exemption to curtail product development is limited.

The effect of this action will differ across processors. Since the exemption is necessary only if a processor would exceed the 30 percent processing cap, a processing company will need to be a large presence in a fishery to benefit from the proposed exemption. Consequently, large processors in a fishery are the primary beneficiaries of this action. Processors that participate in the market in which the exemption is being used could be disadvantaged by the exemption. Processors not limited by the cap could find that the exemption constrains their ability to grow, by removing shares from the already limited market. In some

instances, small processors that choose to have their shares custom processed could benefit from this action, but that benefit is likely to be relatively small in comparison to the benefits to larger entities that use the exemption to consolidate processing activity beyond the current cap.

Since potential for custom processing under the exemption varies across regions and fisheries, the effects on the processing sector for each fishery and region are discussed independently. In the North region of the Bering Sea *C. opilio* fishery, in the first year of the rationalization program, four plants operated. In the second year, only three operated. Based on the number of active processor accounts, most consolidation appears to have occurred among floating processors that have received deliveries for several different IPQ holders. IPQ holders in the North region, in general, have suggested that the current cap limits consolidation that would occur through custom processing, in the absence of the caps. These IPQ holders generally assert that efficiency gains are possible by allowing processing to consolidate into a single facility. In drawing this conclusion, IPQ holders point to the extended period over which deliveries are made under the rationalization program. In the first two years of the program, North deliveries in the fishery were made over a period in excess of four months (see Table 16). Based on the current TAC and IPQ cap (without the exemption) and the number of days between the first and last landing in the first two years of the program, a processor in the North region would receive on average between 50,000 pounds and 65,000 pounds, per day. If processing consolidated to a single facility in the absence of the cap, average daily delivery to the plant would be approximately 75,000 pounds and 95,000 pounds, per day (based on the current TAC and number of days between the first and last landing in the first two years of the program). In the North region, little processing occurs other than crab processing. Crab processing tends to be labor intensive, requiring relatively large crews. The cost of transporting, housing, and provisioning crews at more than a single plant in the North region is asserted by IPQ holders to substantially drive up the cost of processing. Allowing custom processing in excess of the cap could relieve some of these costs by reducing the expenditures on capital and labor.

The different options under consideration could influence the effects of the exemption on processors. Applying the exemption only to shore plants would provide a competitive advantage to the only shore plant in the area that currently processes crab – the shore plant in St. Paul. The ability to use floating processors would increase competition that might be limited, if the exemption applies only to shore plants. Requiring floaters to operate at a dock or docking facility to qualify for the exemption might drive up the cost of using a floater by requiring it to pay docking and wharfage costs (and, in some instances, additional costs related to permitting).

Table 16. Days between the first landing and last landing by region, fishery, and season (2005-2006 and 2006-2007).

Fishery	Region	2005-2006	2006-2007
Bering Sea <i>C. opilio</i>	North	129	159
Eastern Aleutian Islands golden king crab	South	80	86
Western Aleutian Islands golden king crab	Undesignated	182	78
	West	118	17

Source: RAM IFQ database.

Applying the exemption to the North region of the Pribilof red and blue king crab and the St. Matthew Island blue king crab fisheries would have an effect on the processing sector similar to effect on the Bering Sea *C. opilio* fishery. The Pribilof and St. Matthew Island fisheries have not been open for several years. The St. Matthew Island fishery could open in the next few years. The Pribilof fishery is not likely to open in the near future, so any effects of this action on that fishery are more speculative. Both fisheries were historically prosecuted in the early fall, with most of the catch being made over a few weeks. Under

the rationalization program, it is likely that the season would lengthen to some extent, but most participants believe that the fishery would continue to be prosecuted during the fall, possibly extending into the early winter. The current cap would require at least three processors to operate in the North region in both fisheries. As in the Bering Sea *C. opilio* fishery, consolidation through custom processing would reduce costs of capital and crews (transportation, housing, and provisions) by allowing all processing to occur at a single plant. Applying the exemption to the South would effectively allow consolidation by IPQ holders that are at or over the cap based on their North share holdings and processing activities. Processor efficiency benefits could be realized through the application of the exemption to the South, but those benefits are likely to be relatively minor.

Applying the exemption only to shore plants in the Pribilof and St. Matthew Island fisheries would provide a competitive advantage to the St. Paul shore plant - only shore plant in the North region. In the South, where several shore plants process crab, limiting the exemption to shore plants is unlikely to provide any competitive advantage to one plant or processor over another. Extending the exemption to floating processors could increase competition. Limiting this extension to floaters operating at docks or docking facilities would reduce that competition to some extent, but not substantially.

Processing in the Eastern Aleutian Islands golden king crab and the Western Aleutian Islands red king crab fisheries takes place almost exclusively in Dutch Harbor. In the Eastern Aleutian Islands golden king crab fishery, most processing takes place in the early fall, preceding or early in the Bristol Bay red king crab season. The Western Aleutian Islands red king crab fishery was historically prosecuted in the late fall, opening after the Bristol Bay red king crab fishery. Under the rationalization program, it could be prosecuted simultaneously with Bristol Bay red king crab. Applying the exemption to these fisheries is likely to provide some processor efficiency by reducing the number of plants that must maintain crab lines during these seasons and coordinate landings with harvesters. The processor benefit arising from the exemption is likely to be substantially less than the exemption will provide in other fisheries where substantial processing takes place in more remote regions. It is likely that most plants receiving deliveries from these fisheries will be multispecies plants that maintain crews throughout the seasons for these fisheries regardless of whether consolidation is permitted under this action. Efficiencies might still be realized by reducing the number of crew that need to be on hand for deliveries and through other operational efficiencies arising from specializing operations within a plant. Limiting consolidation by applying the option to cap processing at a single plant at 60 percent of the IPQ in the fishery would still allow for some processor benefit from consolidation, while limiting the potential for processing to be consolidated in a single facility.

Fifty percent of the Western Aleutian Islands golden king crab fishery IPQ allocation is required to be landed in the West region; the remainder may be landed anywhere. The number of days between the first and last landing in the fishery fluctuated greatly in the first two years of the program. Even with a relatively short period of landings of 80 days, the average landing poundage per day is less than 40,000 pounds. If only the West region IPQ are landed in the West during this period, the daily landings will average less than 20,000 pounds. Applying the exemption in the West could be beneficial to holders of West IPQ by allowing efficiencies to be realized at a single plant. As with other remote region processing, allowing consolidation in a single facility could reduce capital and crew related cost that arise from requiring multiple plants to operate to fully process the IPQ allocation.

If the exemption is limited to shore plants, the Adak shore plant (the only crab processing plant currently processing in the region) will be provided a competitive advantage over other plants. Extending the exemption to floating processors would increase competition among facilities. Limiting the exemption to

floating processors at docks or docking facilities (as proposed under the preferred alternative) could increase processing to some extent. Broadening the scope of the exemption to include any processing in Atka (as also proposed under the preferred alternative) could slightly decrease costs for IPQ holders, in the event that processing prices offered by the Adak shore plant are not competitive. Extending the exemption to processing of all IPQ in the fishery could provide minor additional efficiency benefits to IPQ holders by allowing consolidation of any processing outside of the West in a single facility. Most likely any such processing would be in a shore plant in Dutch Harbor, where most of the processing in the fishery has historically taken place. The extension of the exemption to floating processors (or floating processors at docks or docking facilities) is unlikely to affect the level of competition.

2.4.6 Effects on the harvesting sector

The effects of this action on harvesters are likely to be limited. In some cases, harvester operational efficiency could be improved, if processing is consolidated in a single location that has access to goods and services that might be desirable during the season. Harvester operational efficiency could suffer, if a single processor is unable to receive and process landings in a timely manner. This effect, however, is not likely except possibly in the Bering Sea *C. opilio* fishery, since the other fisheries have typically had relatively small TACs. In those smaller fisheries, harvester consolidation is likely to spread landings over time, limiting the potential for landings to overwhelm a processor. Additional harvester efficiencies could be realized in the Western Aleutian Islands golden king crab fishery, if processors choose to move their processing of Undesignated shares to the West region, closer to fishing grounds in that fishery. This consolidation will occur, only if processors are able to process landings in the West at the same or lower cost as in ports outside of the West region. In addition to harvester operational efficiency, the Council has suggested that this action should address two other harvester concerns – inseason contingencies and harvesting of the full TAC.

Addressing inseason contingencies

In certain instances, allowing a processor to exceed the share use cap through custom processing could address inseason contingencies (such as breakdown of a processing plant). For example, if one of two plants operating in a fishery subject to the exemption were to breakdown, all processing scheduled for the plant suffering the breakdown could be consolidated into the other plant, regardless of whether the plant would exceed the 30 percent cap. It is important to bear in mind that the exemption proposed in this action would be irrelevant, if the remaining processor is not at or over the cap. In addition, processors may be able to juggle deliveries between facilities with both remaining within the cap, if one plant is disabled temporarily. The exemption is important to addressing the contingency, only if consolidation of the processing in a single plant is beneficial to addressing the contingency and that consolidation would exceed the cap.

The custom processing exemption is likely to be most useful for addressing contingencies in circumstances where participants are not using the exemption but for the contingency. In most fisheries and regions, if processing is consolidated beyond the 30 percent cap through custom processing, few opportunities to further consolidate are likely to exist, limiting the effectiveness of the exemption in quickly addressing contingencies. In both the Bering Sea *C. opilio* fishery and the Western Aleutian Islands golden king crab fisheries, application of the cap without the exemption requires only two plants to operate. Consolidation beyond the 30 percent cap under the exemption is likely to lead to processing being consolidated in a single plant. In the case of a contingency arising, the exemption is likely to help most, if processors have not previously chosen to consolidate their processing to a single plant. In that circumstance, two plants are likely to have been operating in the fishery or region, allowing concentration

of landings at one of the plants. Despite this limitation, the exemption could provide flexibility to address contingencies through use of floating or shore plants.

Full harvest of the TAC

The potential for this action to affect harvest of the full TAC is limited and difficult to discern. The only fishery affected by this action in which participants have failed to fully harvest the TAC is the Western Aleutian Islands golden king crab fishery. Harvesters took the full TAC in that fishery in the first season of the program, but only slightly more than 80 percent of that TAC in the second season of the program. Exemption of custom processing from use caps would likely have had no effect on this failure to harvest the TAC (or any future foreseeable failure to harvest the TAC). It is believed that the weak market for golden king crab together with the relatively high cost of processing in the West region contributed to the failure to fully harvest the Western Aleutian Islands golden king crab TAC. It is also believed that the harvester who left the largest number of shares unharvested failed to timely commit those shares to an IPQ holder to be eligible for arbitration. Had the harvester followed the timeline for matching shares and arbitration, the TAC might have been fully harvested.

Under the current rules governing IFQ/IPQ share matching and arbitration in the fisheries, holders of A shares are permitted to unilaterally commit A share IFQ to IPQ holders and establish a price through the arbitration system. The only circumstance in which a custom processing exemption from IPQ share caps could affect harvest of the TAC would be, if a harvester were to perceive that the arbitration system is capable of creating a higher ex vessel price based on sharing of processing efficiencies arising from the exemption with harvesters and if the ex vessel price created in the absence of the exemption is not high enough to justify fishing. In addition, the increase in the price determined by the arbitration with custom processing exempt from the use cap would need to be high enough to justify fishing.¹⁹ The potential for these circumstances to arise is not known.

2.4.7 Effects on participants in other fisheries

The effects of the proposed custom processing exemption on participants (in the broadest sense) in other fisheries are expected to be limited to the potential for transfer of labor, vessels, or processors into other fisheries related activities. Since the action is likely to concentrate processing activity, its effect on harvesters is likely to be a slowing of the offloading process and the resulting offload queuing time. It is unlikely to result in substantially fewer vessels participating in the crab fisheries, or shorter duration of participation for vessels, so harvesters are unlikely to be able to increase their catcher vessels' participation in other fisheries.

In the processing sector, this action has the potential to allow the consolidation of processing in a single facility, in certain regions and fisheries, beyond the current processing use cap. Some groundfish processors have expressed concern that the consolidation could contribute to availability of floating platforms to participate in other fisheries, which could affect the processors currently participating in those groundfish fisheries. The potential for this action to contribute to available processing capacity (beyond that which occurred under rationalization, prior to this action) is limited.

¹⁹ Generally, the price that is high enough to justify fishing is the price that would cover the cost of fishing including normal profits. Given the existing investment in a vessel and potential benefit from keeping a vessel and crew active in a fishery, it is possible that the price need not be sufficient to cover costs of fishing to justify entry of the vessel to the fishery.

Processor concerns have focused primarily on the activity of floating processors that have historically participated in the Bering Sea *C. opilio* fishery, now being freed up to process groundfish. In the first two years of the rationalization program, four and three processors participated in the North region, respectively, while four and six processors participated in the South region, respectively (see Table 9). This participation is a substantial decline from the 15 to 20 processors that participated in the years immediately preceding implementation of the program (see Table 17).²⁰ Given this level of consolidation under rationalization, the potential for this action to contribute to further consolidation that has a perceptible effect on processors in other fisheries, is very limited.

It should also be noted that several of the processors active in the crab fisheries (including floating processors) have substantial groundfish processing history in the years preceding rationalization. The activity of these processors in the groundfish fisheries suggests that the potential encroachment arising under the crab rationalization program, and the preferred alternative herein, in particular, is limited. Given that this action has a very minor contribution to the removal of processing capacity from the crab fisheries, its potential to affect processors in other fisheries is likely very limited.

Table 17. Number of Bering Sea *C. opilio* processors and pounds of Bering Sea *C. opilio* processed and groundfish metric tons processed (2000 to 2006).

Year	Floating processors				Shore plants			
	Number processing <i>C. opilio</i>	Pounds of <i>C. opilio</i> processed	Number also processing groundfish	Metric tons of groundfish processed	Number processing <i>C. opilio</i>	Pounds of <i>C. opilio</i> processed	Number also processing groundfish	Metric tons of groundfish processed
2000	8	11,334,055	4	20,643*	13	17,368,115	10	511,513
2001	7	7,679,544	2		9	12,384,973	9	569,161
2002	7	10,431,706	3	38,055	8	18,019,554	8	439,246
2003	7	9,940,280	3	50,486	9	14,920,675	9	608,591
2004	7	8,166,347	3	50,099	10	12,983,044	10	619,614
2005	7	8,132,162	3	35,402*	9	14,372,224	9	627,413
2006	5	7,284,776	1		12	23,972,928	7	468,187

* Includes two years processing for confidentiality.

Source: ADFG fish tickets.

2.4.8 Effects on communities

The effects of this action on communities and community sustainability vary by region and fishery and depend on the specific options selected by the Council. In considering the effects of the action, it is important to distinguish effects arising out of the action – the exemption of custom processing from the processing share cap – from effects that would arise independent of the action. Under the current caps, in which custom processing counts against the cap of the processing plant owner, custom processing arrangements have facilitated the movement of shares among plants. The effect of this action is limited to the contribution of the exemption to that consolidation.

Custom processing has clearly contributed to consolidation of processing in the North region of the Bering Sea *C. opilio* fishery. In that fishery and region, three plants have processed the allocations of nine IPQ holders. In the fishery, approximately 10 percent of the IPQ were subject to the ‘cooling off’

²⁰ Complete data are not available showing the number of processors in each region in the years preceding implementation of the rationalization program.

provision, which required their processing in St. George for the first two years of the program. Because of storm damage to the St. George harbor, processors were unable to process those landings in St. George. Instead, the landings were moved to floating processors that operated around St. Paul.²¹ The Council has currently scheduled initial review of an amendment that would extend the ‘cooling off’ period applicable to shares in St. George for a period of one or two additional years. For purposes of this action, it is important to note that the consolidation of processing away from St. George occurred independent of the exemption of custom processing from the processor share cap. Even if the ‘cooling off’ period is extended for shares linked to St. George, it is possible that additional movement of those shares could occur regardless of this action. This action, however, could facilitate movement of shares among communities, if greater consolidation would occur or would occur more quickly than in the absence of the exemption.

The effect of this action on communities will be determined by the extent to which the exemption would facilitate the movement of shares to, away from, or among communities. The potential for the action to result in the movement to or away from communities depends on the options selected by the Council. Specifically, if the exemption is limited to either shore plants or floating processors at docks or docking facilities (as is proposed under the preferred alternative), the action will clearly not facilitate the movement of shares away from communities. Under either of the community based options, it is not clear that the action will contribute to the movement of shares to communities. If the action limits the exemption to shore plants, and consolidation of processing under custom processing arrangements at shore plants does not offer benefits to processors beyond those attainable at less consolidated floating processors outside of communities, it is likely that the exemption will have no effect on the geographic distribution of processing. Similarly, if applicable to both shore plants and floating processors docked or at docking facilities (as proposed under the preferred alternative), the exemption will only have an effect, if the consolidation under the exemption is of greater benefit to IPQ holders than less consolidated operations outside of communities. Considering only the potential for consolidation of processing within communities, it would appear that extending the exemption to floating processors docked or at docking facilities (as proposed under the preferred alternative) increases the potential for processing to be located in communities under the exemption. Qualifying docked floating processors will increase the potential for a community based processor to be more efficient than a less consolidated operation outside of a community by simply qualifying more community based operations for the exemption.

The benefit brought to communities by a docked floating processor may differ from that of a shore plant. At the extreme, a local shore plant could lead to a more stable local population. Under any circumstance, a locally housed shore plant crew would likely contribute more activity to the local economy than the crew of a docked floating processor. This difference in effects likely varies with operations and communities. An economy with little local economic activity may receive little benefit from a non-resident processing crew that spends little money in the community and has limited interaction with the local community. A resident processing workforce will provide a substantially greater local benefit. While consolidation at a docked floating processor is likely to provide some benefits to a community, a similar level of consolidation at a shore plant could provide a greater local benefit.

In the Bering Sea *C. opilio* fishery, the exemption of custom processing is limited to shore plants and floating processors “moored in the harbor” by the Magnuson Stevens Act reauthorization. The only option defining platforms eligible for the exemption that meets that definition is the option identified for the preferred alternative that would limit the exemption to shore plants and floating processors at docks or

²¹ This exemption granted in the second year is under appeal by St. George. The outcome of this appeal is uncertain.

docking facilities in a city. Under this option, the shore plant in St. Paul²² and floating processors in St. George and St. Paul would qualify for the exemption. The current trend is that processing has moved from St. George to St. Paul. A substantial number of IPQ holders have elected to move their processing to floating processors. While the exemption might appear to further facilitate this movement of processing from St. George, it is not clear that the exemption will effect that migration. On the other hand, the exemption could bring a benefit to St. Paul, even if it is not the cause of any loss to St. George. If the exemption requires the custom processing to be conducted at a shore plant or a docked floating processor, processing could be moved into St. Paul or its harbor to qualify for the exemption. This influx of activity and workers could bring additional economic activity to the community, which would otherwise be lost to other locations in or outside of Alaska.

The St. Matthew Island and Pribilof fisheries have been closed for several years. In the North region, shares in these fisheries are linked only to St. Paul by the ‘cooling off’ provision²³ and right of first refusal. Since most North shares in the Pribilof fishery were historically processed in St. Paul, application of the exemption to the North region is unlikely to facilitate the movement of shares into St. Paul; however, granting the exemption to floating processors regardless of their location could facilitate the movement of shares away from St. Paul. If the exemption is granted only to custom processing by shore plants or docked floating processors (as proposed by the preferred alternative), the exemption would not facilitate movement of shares outside of communities, but at some point could be used to move processing from St. Paul to another community (such as St. George), if a processor believed that greater efficiencies could be realized in that other community. In the St. Matthew Island fishery, most processing in the North has occurred outside of any community. Approximately 10 percent of the qualified historic processing occurred in St. Paul. Granting the exemption to shore plants or docked floating processors could facilitate the movement of processing into communities, if processors believe that consolidation will provide economic benefits. Currently, consolidation is most likely to occur in St. Paul, but in the long run, another community (such as St. George) could be a more attractive location for the consolidation of processing. If the exemption is granted to any floating processor, consolidation could draw historic processing from St. Paul reducing benefits to St. Paul and communities in general.

Granting the exemption in the South region for the St. Matthew Island and Pribilof fisheries (as proposed in the preferred alternative) is unlikely to have much effect on communities. Less than 35 percent of qualified historic processing occurred in the South in these two fisheries. Several processors participated, who have facilities in several locations. Since the cap is unlikely to bind in the South, and many facilities are available for processing, it is unlikely that the cap exemption is necessary for consolidation. The only circumstance under which the exemption could have an effect is if a processor with substantial share holdings in the North were limited in its ability to custom process in the South. In this circumstance, it is possible that the exemption would allow some consolidation. In any case, the only community which might suffer any loss of processing activity would be Dutch Harbor, where most of the qualified historic processing in the South occurred. The loss would occur only if the exemption were necessary for a processor outside of Dutch Harbor to consolidate processing. If the exemption is limited to shore plants, and/or docked floating processors (as proposed under the preferred alternative), the exemption would result in a transfer of benefits among communities. Since few communities that are likely to receive this processing have economies as well developed as the economy in Dutch Harbor, it is likely that some benefit would be lost to other locations in and outside of Alaska.

²² The shore plant in St. George would qualify for the exemption, as well. That facility, however, does not currently process crab or have crab processing capability.

²³ The ‘cooling off’ provision limits movement of processing shares only during the first two years of the program regardless of whether a fishery is open (see 50 CFR 680.42(b)(4)).

In the Western Aleutian Island red king crab fishery, processor shares are not subject to the ‘cooling off’ provision, rights of first refusal, or regional landing requirements. Processor shares are currently held by several processors, with most shares held by processors with Dutch Harbor plants. The fishery has been closed in most recent years. If the exemption is granted in this fishery (as proposed under the preferred alternative), it is possible that processing could either consolidate in Dutch Harbor or move out of Dutch Harbor, most likely closer to the fishing grounds west of Dutch Harbor. If the exemption is limited to shore plants and docked floating processors(as proposed under the preferred alternative), movement out of Dutch Harbor is likely to be to a community closer to the fishing grounds in the west, such as Adak or Atka. Processing opportunities in Atka could increase if any processing in that community (regardless of whether that processing takes place onshore or at a docked or moored floating processor) receives the exemption (as proposed under the preferred alternative). If the exemption is granted to floating processors, no matter where they are physically located, it is possible that no community would benefit from consolidation beyond the cap. The exemption in this fishery and the Western Aleutian Islands golden king crab fishery could interact, contributing to consolidation of processing from both fisheries in a single plant, west of Dutch Harbor and nearer to the grounds for the two fisheries (if and when the red king crab fishery opens). Since processors are required to process 50 percent of the Western Aleutian Islands golden king crab in the West region (which does not include Dutch Harbor), if processor efficiencies can be gained by consolidation of processing catch from both fisheries in that region, it might be undertaken. Consolidation in the West could be stimulated, if harvesters are willing to share a portion of the efficiencies they realize by not incurring the travel time and expense to deliver in Dutch Harbor. Limiting the exemption to shore plants, floating processors docked or moored in a community, or at any location in Atka would likely limit any use of the exemption to Adak or Atka.

Almost all qualified historic processing in the Eastern Aleutian Islands golden king crab fishery occurred in Dutch Harbor. Granting the exemption in this fishery is unlikely to have any community effects, since the fishery is prosecuted relatively close to Dutch Harbor and most processor share holders operate shore plants in that community. If the cap is extended to any floating processor, no matter the inshore location, it is possible that consolidation could occur on a floating processor outside of the community.

As in the case of the aforementioned Western Aleutian red king crab, Western Aleutian Islands golden king crab is not subject to the ‘cooling off’ provision or the right of first refusal. The fishery is subject to regional landing requirements, under which 50 percent of the IPQ is required to be landed in the West region, with the remainder free to be landed in any location. Extension of the exemption to this fishery could lead to consolidation of processing, particularly in the West region. If limited to shore plants, consolidation could currently occur only in Adak. Extending the exemption to docked floating processors (as proposed under the preferred alternative) could make consolidation more likely, increasing competition, providing increased options to processing share holders to achieve benefits needed to stimulate that consolidation. Limiting the exemption to shore plants and docked floating processors would ensure that benefits are realized by a community. The extension of the exemption to any processing in Atka (as proposed under the preferred alternative) could lead to additional processing in that community. If this processing is seen as successful, it could lead to improvements in docking facilities and possibly shore based operations in the long run. If the exemption is granted to any floating processor, no matter the inshore location, it is possible that the consolidation would move shares from communities that currently process landings in the fishery. If the exemption is granted to any processing in the West region (including processing of undesignated shares), it could attract processing to the West region from locations outside of the West, primarily Dutch Harbor. For this to occur, processor share holders would need to perceive a benefit from this consolidation. It is possible that harvesters could share some of their

operational efficiency benefits with processors (i.e., accept a lower price) as a trade-off to avoid costs of round trip travel from the fishing grounds, queuing time, etc., to deliver to Dutch Harbor. If the exemption is granted to shore plants outside of the West region, it could contribute to the consolidation of processing of regionally undesignated shares in Dutch Harbor. Granting the exemption to docked floating processors is unlikely to have any additional effects, since most of the processing share holders operate facilities in Dutch Harbor. If the cap is extended to any floating processor, it is possible that consolidation could occur on a floating processor outside of the community.

2.4.9 Effects on management and enforcement

The effects of this action on management and enforcement burdens will be limited and will depend on the specific options selected. In general, exempting custom processing activity from the cap will have a minor affect on management and enforcement burdens. With relatively high processor share use caps, the exemption could apply in only a few cases in any fishery.

If the option is selected that defines share caps by considering only share holdings (as proposed under the preferred alternative), the management burden will decline to the extent that the provision removes the managers of tracking plant ownership. If the option is selected that applies the exemption only in the case of the share holder and plant owner have limited common ownership, assessing whether the common ownership threshold is met will require plant ownership information. Under this option, the management burden of assessing plant ownership will be unchanged from the status quo.

Limiting the exemption based on the location of the processor could also increase the oversight burden. If the exemption applies only to shore plants or to shore plants and any floating processor, the application of the exemption will be clear and will be similar to the current management burden of simply tracking share holdings and usage. If the exemption is limited to shore plants and floating processors that are docked or at docking facilities (as proposed under the preferred alternative), monitoring compliance could be slightly more complicated, as processing locations for floaters will need to be tracked. Likewise, extending the exemption to any processing in Atka (as proposed under the preferred alternative) will require additional monitoring of floating processors wishing to use the exemption in that community.

The management burden arising from the exemption is likely to vary with the specific options selected to define the exemption. If the exemption is developed to remove the need for managers to track ownership of plants, the exemption would simplify monitoring. Some additional burden will arise, if the provision requires the tracking of floater locations to determine eligibility for the exemption. Yet, because of its limited applicability, this provision is likely to have very minor effects on management and enforcement burdens.

2.5 Analysis of alternatives to exempt processing in the community of origin from the processing share cap

The second part of this action would extend cap exemption to custom processing that occurs in the community of origin after the transfer of processing shares from the initial recipient of those shares. As noted earlier, under existing regulations custom processing at a facility counts toward the IPQ use cap of the facility owner as well as the IPQ holder. This calculation method applies to IPQ that is, or was once, subject to a right of first refusal. Under the first option, IPQ that are, or once were subject to a right of first refusal would and that are custom processed at a facility would not apply to the facility owner only if the shares are transferred to the entity that holds the right of first refusal on behalf of the community of origin. Under the second option, the exemption would apply to custom processing of the shares in the

community regardless of the holder of the processing shares.²⁴

The Council's purpose and need statement for this portion of the action is:

Under the rationalization program, community interests in historic processing are protected by granting communities a right of first refusal on the transfer of shares from the community of origin. In some instances, the combination of consolidation of processing share holdings and the counting of processing at a plant against the plant owner's cap on the use of processing shares could complicate the retention of processing in the community of origin. Exempting processing of shares in the community of origin from the use cap of the plant owner could facilitate retention of historical processing in communities.

The immediate motivation for this action is the merger of two processors, which results in the newly merged company exceeding the processor share cap. A portion of the processor share holdings of the merged company are based in a community in which a single processing plant operates. That plant is owned by the merged company. On divesting shares to comply with the share cap, the new company will be unable to process the shares in the community of origin under the current share cap. The probability of a competing processor moving into the community is believed to be small by both the community and the entity holding the right of first refusal. Given the consolidation in processing that has occurred in processing in the first two years of the program (see Table 9 and Table 13), the community's concern seems well founded.

Provisions to protect interests of the community of origin (preferred alternative in bold)

Option 1) In the event that processing shares are transferred to the community entity holding the right of first refusal for those shares, the processing of those shares in the community of origin will not count toward the cap of the processing plant.

Option 2) In the event that processing shares currently or formerly subject to a right of first refusal are transferred from the initial recipient, custom processing of shares in the community of origin will not be counted toward cap of the processing plant (the shares would only count toward the cap of the share holder).

The Council has identified two options for defining the exemption. Under the first, the exemption would be available only if the shares are transferred to the community entity holding the right of first refusal. Transfers to any other person would not qualify for the exemption. This option may be favored, if it is believed that the community entity needs to control the processing of the shares to ensure that the community benefit is most completely realized. Under the second option (which is the preferred alternative), the exemption would apply once the shares are transferred from the initial recipient. Under either option, the exemption would only apply if the shares are processed in the community of origin (as defined for rights of first refusal). The second option may be preferred as a means to provide the community of origin a benefit of local processing of the shares without requiring the community entity to locate funding for the acquisition of those shares.

2.5.1 Effects on the processors

Granting the cap exemption to custom processing could facilitate improvements in processing efficiency, particularly if a community entity is committed to maintaining processing of its holdings in the community of origin. If the entity would be compelled to open a new, second facility in a community because custom processing at an existing plant would not comply with the cap, it is clear that the cost of

²⁴ It should be noted that in all cases, the shares would count toward the cap of the share holder. The entity providing custom processing services would not have the shares counted toward its cap.

processing would increase.²⁵ Likewise, if the exemption is granted to entities other than the community entity (as proposed by the preferred alternative), it is possible that some efficiency gain could occur for a share holder that wishes to comply with a commitment to process in the community of origin under the right of first refusal. The extent to which processors will use this provision is uncertain. In all of the fisheries, at least one processor's share holdings approaches or exceeds 25 percent of the processing share pool. The exemption would apply only if a processor attempts to increase its processing beyond the 30 percent cap. Yet, since the exemption only applies to processing in the community of origin (and possibly only to custom processing for the community entity) the provision may be used infrequently and have little effect.

The effects of this action will differ across processors. Since the exemption is irrelevant, if a processor does not exceed the 30 percent processing cap, only large processors in a fishery are likely to derive a benefit from the proposed exemption. Under this exemption, it is likely that large processors will work with either a community group or other entity holding shares from the community of origin to complete a transaction that ensures that shares from a community will be processed in its plant. Processors that participate in the market that the exemption applies to could find that the exemption constrains their ability to grow by removing shares from the market. Even though this exemption may be used infrequently, in a market with few transactions allowing additional consolidation could limit opportunities for a small entity to enter or grow.

2.5.2 Effects on harvesters

The effects of this action on harvesters are likely to be very limited. Although the action would exempt some processing from the current cap, the exemption is likely to have limited applicability and be used infrequently. Harvester operational efficiency could be improved or impaired, depending on the circumstances. If the processing location requires additional travel or has fewer goods and services available, harvesters could lose efficiency. If processing is concentrated in an advantageous location, harvesters could realize a benefit from processing concentration under this action. In any case, the effects on harvesters are likely to be limited since the exemption is unlikely to apply to many circumstances.

2.5.3 Effects on communities

The effects of this action on communities are likely to be limited and differ across communities. Communities that seek to retain historic processing could benefit from processors being permitted to process in excess of the facility cap under the exemption. The provision is less likely to be needed for processing in communities with small processing operations. Yet, since some of the large processors (that are likely to be affected by this action) operate facilities in more than one community, the action could benefit communities with relatively small amounts of crab processing. Although some communities could benefit from retention of crab processing, others are likely to be frustrated to the extent that this action prevents the development of additional processing activity. The specific effects of exemption created by this action on the distribution of processing are uncertain and largely depend on the actions of processors in the fisheries.

The two different options under consideration could have different effects on different communities. Under the first option, a community entity would be required to hold shares for the exemption to apply. This option could be cost prohibitive for some community entities which have limited resources to

²⁵ The processing efficiency gain likely arises primarily from the commitment of the community entity to process its holdings in the community of origin. In most instances, it is likely that the shares could be moved to a facility elsewhere without sacrificing processing efficiency.

acquire shares. A processor that is willing to enter an arrangement with a community entity could be reluctant to do so, unless the commercial terms of the arrangement are at or near a market rate. If the community entity is unable to participate in the processing share market at market rates, shares could be lost to the community of origin. Under the second option (which is included in the preferred alternative), the exemption would apply to processing in the community of origin, regardless of the holder of the shares. This provision may help a community retain shares that the community entity could not afford to purchase by allowing others to use the exemption. Under this provision, however, the nexus between the share holdings and the community is much weaker than when those shares are held by the community entity. Whether a community of origin is likely to realize a greater benefit from one option or the other will depend on the circumstances and the willingness of the other parties involved to respect community interests.

2.5.4 Effects on management and enforcement

Since the exemption defined by this action is unlikely to be used extensively, its effect on management and enforcement will be limited. The management burden of the different provisions will differ slightly under the two options. Under the first option, the exemption will apply only to shares held by a community entity. In this case, custom processing of the shares will not be subject to the processing share cap. Administration of the provision will be simplified, since any time the shares are held by a community entity, the physical processing of the shares will not affect compliance with the share cap.

Under the second option (which is included in the preferred alternative), monitoring the cap will be slightly more complicated. The exemption will apply to any processing of the shares in the community of origin, after the shares have been transferred from the initial recipient of the shares. This provision will require administrators to track share holdings of any entity after their first transfer and disregard any processing of the shares in the community of origin. Administration of this provision will require administrators to monitor the processing of shares in the community of origin, regardless of the share holder, for purposes of applying the exemption. Although the provision is relatively straight forward to apply, the tracking of shares is more complicated than under the first option.

Since neither of the options is anticipated to have broad applicability, the administrative burden under either is anticipated to be minimal.

2.6 Net benefits to the Nation

A minor overall net benefit to the Nation is likely to arise from this action. The action is likely to increase production efficiency for some processors, reducing efficiency losses that arise from limits on consolidation of processing activity under the rationalization program.

3 REGULATORY FLEXIBILITY ANALYSIS

3.1 Introduction

This Final Regulatory Flexibility Analysis (FRFA) evaluates the impacts of the final rule implementing Amendment 27 to the Fishery Management Plan for Bering Sea / Aleutian Islands King and Tanner Crabs (FMP) on small entities. This rule establishes new methods to calculate processing use caps applicable in the Bering Sea/Aleutian Islands (BSAI) Crab Rationalization Program (Program).

The Program assigned quota share (QS) to persons based on their historic participation in the BSAI crab fisheries during a specific time period. Under the Program, NMFS issued QS to holders of License Limitation Program (LLP) licenses and crew onboard vessels. One type of QS, catcher vessel owner (CVO) QS is assigned to holders of LLP licenses who delivered their catch onshore. Each year QS yields an exclusive harvest privilege for a portion of the total allowable catch (TAC) called individual fishing quota (IFQ).

NMFS also issued processor quota share (PQS) under the Program. Each year PQS yields an exclusive right to process a portion of the IFQ. This annual exclusive processing privilege is called individual processor quota (IPQ). CVO QS yields Class A and Class B IFQ. Class A IFQ is required to be delivered to a processor with matching IPQ within specific geographic regions. Class B IFQ can be delivered to any processor in any geographic region. Ninety percent of the IFQ derived from CVO QS is Class A IFQ, and the remaining 10 percent is Class B IFQ. These requirements ensure that catch continues to be delivered to processors and communities with historic investment in the fisheries.

Currently, processors are limited in how much IPQ they can receive at a processing facility. In each of the nine BSAI crab fisheries under the Program, a person is limited to holding no more than 30 percent of the PQS initially issued in the fishery and using no more than the amount of IPQ resulting from 30 percent of the initially issued PQS in a given fishery. In addition, no person is permitted to use more than 60 percent of the IPQ crab in the Bering Sea C. opilio fishery designated for exclusive use in the north region. Finally, no processing facility can be used to process more than 30 percent of the IPQ in a crab fishery.

The Program is designed to minimize the potential that PQS and IPQ use caps could be evaded through the use of corporate affiliations or other legal relationships that would effectively allow a single person to use PQS or IPQ even if they are not the majority owner of that PQS or IPQ. Specifically, the Program calculated a person's IPQ use cap by summing the total amount of IPQ that is (1) held by that person; (2) held by other persons who are affiliated with that person through common ownership or control; and (3) any IPQ crab that is custom processed at a facility an IPQ holder owns. A custom processing arrangement exists when one IPQ holder: (1) has a contract with the owners of a processing facility to have his crab processed at that facility; (2) that IPQ holder does not have an ownership interest in the processing facility; and (3) that IPQ holder is not otherwise affiliated with the owners of that crab processing facility. In custom processing arrangements, the IPQ holder contracts with a facility operator to have the IPQ crab processed according to his specifications. Custom processing arrangements typically occur when an IPQ holder does not own an onshore processing facility or cannot economically operate a stationary floating crab processor in a specific region.

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) became law on January 12, 2007 (Pub. L. 109-479). Section 122(e) of the MSRA specifically directed NMFS to modify the means for calculating IPQ use caps that apply to a person who is custom processing C. opilio crab in the north region. To fully implement Section 122(e), NMFS would need to adopt conforming regulations. However, several of the specific terms used in Section 122(e) are not defined in the statute or in regulation and no legislative history is available to guide NMFS on how to interpret those terms.

In response, the Council received guidance from the public and adopted recommendations to revise the Program to implement section 122(e) of the MSRA. During this process, participants in other crab fisheries expressed concerns about the economic viability of their fishing operations and proposed IPQ use cap exemptions for custom processing arrangements similar to those congressionally mandated for the

north region Bering Sea *C. opilio* fishery. Specifically, participants in crab fisheries with historically low TAC allocations or active in crab fisheries in more remote geographic regions argued that exempting IPQ crab processed under custom processing arrangements from the IPQ use caps of the owners of facilities could improve their operational efficiency. The Council recommended Amendment 27 to clarify that IPQ holders who own processing facilities would not be considered as using IPQ when that IPQ crab was (1) received by an IPQ holder at their facility under a custom processing arrangement; (2) limited to specific crab fisheries; (3) received and processed at specific types of processing facilities; or (4) was IPQ crab that was derived from PQS earned from processing in specific communities where crab has been historically delivered. In addition, the Council recommended limits on the amount of IPQ crab that could be processed at a facility for the Aleutian Islands golden and red king crab fisheries. This final rule would implement the Council's recommendation.

The proposed rule for Amendment 27 was published in the Federal Register on September 19, 2008 (73 FR 54346). The comment period on the proposed rule ended on November 3, 2008. Thirteen comments were received regarding the proposed rule from individuals and organizations. Several of the comments are in support of the action, or seek to clarify the intent of specific text in the regulations. Several comments raise concerns about the adequacy of the analysis, the range of alternatives considered by the Council, and the potential adverse impact of the action on the community of Adak, Alaska. 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. One comments was received that addressed the IRFA. That comment is summarized below.

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).

3.2 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.

3.3 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.

3.4 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) and 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.

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

The objectives of this action are described in detail in the Council's purpose and need statement incorporated into Section 2.1. In brief, the key objectives listed are to "protect the economic base of remote communities dependent on crab processing, and to allow for the efficient prosecution of quota held by fishermen."

The only entities directly regulated by this action are holders of processor shares or custom processors of those shares. Currently, 29 processors hold processing shares. Estimates of large entities were made, based on available records of employment (Fried, 2005), 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, 11 are estimated to be large entities, leaving 18 small entities among the directly regulated universe under consideration within this IRFA.

In addition to current processing share holders, eight government entities hold rights of first refusal for processing shares in the various fisheries subject to this action. These entities are all small entities.

3.6 Public comments

NMFS published a proposed rule for Amendment 27 on September 19, 2008 (73 FR 54346). 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 November 3, 2008. NMFS received fourteen comments from three unique persons on the proposed rule. One of these public comments (summarized below) was about the IRFA. No changes were made in the final rule based on public comment.

Comment: The commenter argues that the IRFA improperly concludes that this action would be expected to benefit the directly regulated entities. The commenter states that Adak Fisheries would be harmed because under this action an IPQ holder will have less incentive to custom process in Adak, and this action would provide an incentive for a person to bring a floating processor into the Aleutians to process crab and Pacific cod which would reduce the potential product delivered to Adak. The commenter asserts that these issues have not been adequately addressed in the IRFA. The commenter notes that the specific requirements to allow custom processing by floating processors in the Aleutian Islands undermines the goals of the Council to sustain communities in the Aleutian Islands. The commenter asserts that allowing floating processors minimizes the potential benefits that may be received by shoreside processing operations.

Response: NMFS disagrees. The commenter's assertions about the effects of this action on the directly regulated entities must be considered separately from the action's effects on other non-directly regulated entities such as the communities of Adak or Atka, and such as processing facilities which are not defined as directly regulated entities. The IRFA concludes that the directly regulated entities are the PQS and IPQ holders who would be allowed to undertake custom processing with less constraint than they could prior

to this action. The PQS and IPQ holders would be expected to benefit because the action would relieve a restriction on their ability to consolidate processing operations and may provide additional benefits relative to the status quo such as improved operations efficiency. The commenter does not provide any information to suggest that this conclusion is not true. The action would allow any directly regulated PQS or IPQ holder to establish custom processing relationships with any other PQS or IPQ holder within the limits established by this action. Specific to this comment, Adak Fisheries, or any other IPQ holder could choose to have crab processed at any facility that is able to process those crab, including Adak, provided that facility is not otherwise ineligible to be used. The potential for a processing facility at Adak to use this provision is addressed at section 2.4.8.

The commenter asserts that the action would reduce the incentive for an IPQ holder to use the processing facility in Adak for custom processing, but provides no reason as to why this may be the case. Facilities in Adak, or any other community, could be used for custom processing. The only factors that would prevent operations from being consolidated in Adak would be those unrelated to this action (e.g., IPQ holders cannot reach agreement with the facility operators on terms to have their crab custom processed at that facility, the facility is unable to meet the processing requirements of the IPQ holders who wish to have their crab custom processed, the facility is not economically viable for a given custom processing arrangement). NMFS has concluded it is unlikely that this action will have a likely effect on processing activities in the Aleutian Islands Pacific cod fishery.

The commenter correctly notes that one of the goals in the Council’s purpose and need statement (i.e., problem statement) for this action is “sustaining communities”, but the commenter fails to consider the Council’s purpose and need statement in its entirety. The Council considered alternatives that would “protect the economic base of remote communities dependent on crab processing, and to allow for the efficient prosecution of quota held by fishermen.” Specifically, the Council considered alternatives that would allow Adak and Atka to benefit from more efficient prosecution of crab fisheries by the exemption of custom processing from the IPQ use caps. The Council noted that given the limited shoreside processing facilities available in Aleutian Island communities other than Adak, allowing floating processors to operate in the Aleutian Islands under specific conditions would help to protect the economic base of Atka by allowing floating operators to operate there, while ensuring that processing operations in Adak may continue. Section 2.3.13 of this analysis notes that Adak has the only shoreside processing facilities in the Central and Western Aleutian Islands, and section 2.4.3 notes that the onshore processing facility “at Adak could be provided a substantial advantage relative to other processors, if only shore plants are qualified for the [custom processing] exemption.” Because the goal of this action is to protect the economic base of all communities, not only Adak, and is to allow efficient prosecution of quota, the Council considered, and ultimately selected options to allow floating processors to operate in the Aleutian Islands as a way to accomplish these two goals. A review of the factors the Council considered is provided in the preamble to the proposed rule, section 2.4 of this analysis, and records of Council deliberation.

3.7 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 proposed alternatives.

3.8 Significant alternatives

A FRFA should include 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.

The Initial Regulatory Flexibility Analysis identified two components of the proposal with significant alternatives. The first was the decision whether or not to count certain custom processing arrangements from being counted against processing caps. The second was the decision to create “right of first refusal” exemptions for custom processing in certain communities.

Processing cap exemptions

In each crab fishery governed by this action, a processing share holder is limited to holding or processing a maximum of 30 percent of the processing shares. Under the current rule, custom processing of deliveries (under which an entity takes delivery of landings and provides processing services, on behalf of the holder of record of processor shares) is credited toward both the supplier of processing services’ cap and the share holder of record’s cap. The first part of this action would exempt the processor accepting landings under these custom processing arrangements from being charged with those landings, for purposes of applying the processing cap, in certain fisheries and locations.

Processing by small entities generally would not require the exemption from the 30 percent limit. Consequently, processing activity of these entities is not likely to be directly affected by the exemption. Instead, these entities are affected by two competing effects that arise out of responses of large entities to the exemption. First, small entities that wish to employ the custom processing services of large entities that are constrained by the cap, will be able to use those services, despite the cap, if the exemption is granted. These small entities could benefit from an additional market for custom processing services that might not exist in the absence of the exemption. A second, competing, effect could arise if small entities that wish to increase their processing, through providing custom processing services, confront additional competition in the market for providing those services from large entities who would otherwise have been constrained by the cap.

The significant alternative to exempting this custom processing from the cap would be to maintain the status quo applying the cap to all custom processing. This alternative, however, would not facilitate additional processing efficiencies that motivate the action.

Right of first refusal exemptions

Under the rationalization program, most processing shares are subject to a right of first refusal by the community of the historic processing that led to the allocation of those processing shares (the community of origin). The second provision under consideration in this action would exempt shares custom processed in the community of origin from the custom processing cap after those shares are transferred from their initial holder. The proposed action would apply the exemption regardless of the holder of the processing shares.

This exemption is intended to bring the greatest benefit to remote communities, historically dependent on

crab processing by allowing that processing to remain in the community of origin. The immediate motivation for this action was the merger of two processors, which resulted in the newly merged company exceeding the processor share cap. A portion of the processor share holdings of the merged company were based in a community in which a single processing plant operated. That plant was owned by the merged company. On divesting shares to comply with the share cap, the new company would be unable to process the shares in the community of origin under the current share cap regulations. The probability of a competing processor moving into the community is believed to be small by both the community and the entity holding the right of first refusal. Given the consolidation in processing that has occurred in processing in the first two years of the program, the community's concern seems well founded.

An alternative to the proposed action could apply the exemption only if the entity that granted the right of first refusal on behalf of the community of origin holds the shares. Small entities that are holders of rights of first refusal might benefit from an alternative limiting eligibility for the exemption, to the extent that they are provided with an advantage over other entities that may wish to contract for custom processing in excess of the cap. On the other hand, limiting the exemption to those entities could harm the communities intended to benefit from the action, if the holders of rights of first refusal are unable or unwilling to exercise those rights. Limiting the exemption to holders of rights of first of first refusal will only be effective in maintaining processing in the community of origin, if those entities actually take advantage of the exemption. In some cases, these rights holders may be unwilling or unable to afford the processor share acquisition, in which case the shares would be moved from the community of origin, if the cap is binding.

Small entities that do not hold rights of first refusal would be affected differently. As with the other part of this action, these options are likely to affect small entities that are not holders of rights of first refusal only indirectly through the actions of large share holders. In the case of a small entity wishing to have its shares custom processed, the potential for the action to benefit the holder will be limited, if only shares held by the community entity are subject to the exemption. Broadening the exemption (as proposed by this action) to all share holders, it is possible that some instances could arise when small entities would have additional custom processing opportunities in the community of origin. In some instances, it is possible that a small entity would have additional competition for providing custom processing services that arises from the granting of this exemption to large entities that would otherwise be constrained by the cap.

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

Nothing in the proposed alternatives would undermine the current management system that prevents overfishing.

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 Islands 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 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 allowing participants to achieve operational efficiencies without adverse effects on others. 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 will increase efficiency in the fishery by allowing consolidation of processing activity that would otherwise be prevented by counting custom processing toward the cap of the provider of custom processing services.

National Standard 6

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

None of the alternatives would be expected to affect changes in the availability of Bering Sea and Aleutian Islands crab resources each year. Any such changes would be addressed through the annual allocation process, which is not affected by the alternatives.

National Standard 7

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

This action should reduce processing costs and will not duplicate other actions.

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.

The first part of this action accounts for the importance of fishery resources to fishing communities by providing a use cap exemption for custom processing at shore plants or floating processors docked or at docking facilities in communities. Although the action could have distributional effects among communities to the detriment of some communities, requiring processing to occur within a community is intended to mitigate adverse economic impacts, to the extent practicable.

The second part of the action extends the exemption to processing in the community of origin after the transfer of shares from the original processor share holder. Allowing processing in excess of the cap under this provision is intended to allow for sustained participation of communities that supported processing in the fisheries historically.

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.

Implementing any one of the alternatives will have no effect on bycatch.

National Standard 10

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

The alternatives considered under this action do not affect safety.

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 harvesting sector and processing sector have been discussed in previous sections of this document. This action will have no effect on participants in other fisheries.

5 REFERENCES

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

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.

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.

Sackton, John (2007b) "2007 Market Analyst Report on Red King Crab", August 25, 2007.

Sackton, John (2007b) "Golden King Crab Price Formula Arbitrator and Market Report", June 25, 2007.

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APPENDIX A. NOAA GC Interpretation of Section 122 (e) Use Caps

January 19, 2007

The NOAA Office of General Counsel for Enforcement and Litigation, Alaska Region, issues the following statement:

On October 15, 2006, the opilio crab fishery season in the Bering Sea subarea opened and, as of the date of this statement, is still open.

On January 12, 2007, the Magnuson Stevens Fishery Conservation and Management Act was reauthorized by the U.S. Congress and signed by the President. (PL 109-479, HR 5946, January 12, 2007).

The following two provisions relating to the processing and use of individual processor quota (IPQ) for the *C. opilio* crab fishery in the Bering Sea subarea are contained in that Act:

SEC. 122. CONVERSION TO CATCHER/PROCESSOR SHARES.

(e) USE CAPS.—

(1) IN GENERAL.--Notwithstanding sections 680.42(b)(ii)(2) and 680.7(a)(ii)(7) of title 50, Code of Federal Regulations, custom processing arrangements shall not count against any use cap for the processing of opilio crab in the Northern Region so long as such crab is processed in the Northern Region by a shore-based crab processor.

(2) SHORE-BASED CRAB PROCESSOR DEFINED.--In this paragraph, the term "shore-based crab processor" means any person or vessel that receives, purchases, or arranges to purchase unprocessed crab, that is located on shore or moored within the harbor.

For purposes of assisting fishermen and processors in complying with the above provisions, the NOAA Office of General Counsel for Enforcement and Litigation, Alaska Region, provides the following guidance:

- (1) The phrase "custom processing arrangements" as used in Section 122(e)(1) refers to:
 - (a) a binding and legal contractual arrangement for the processing of crab that is entered into prior to the occurrence of the processing of the crab and;
 - (b) in which the processed crab is debited from an IPQ account other than the IPQ account belonging to the owner of the processing plant at which the contract processing occurs.

(2) The phrase "any use cap" as used in Section I22(e)(1) refers to the IPQ use cap as defined in 50 CFR 680.42(b)(1)(ii), or 50 CFR 680.42(b)(2), and calculated as defined in 50 CFR 680.7(a)(7).

(3) The phrase "Northern Region" as used in Section I22(e)(1) refers to IPQ derived from processor quota share designated for the North Region as defined in 50 CFR 680.40(d)(2)(i).

(4) The phrase "shore-based crab processor" as used in Section 122(e)(2) includes the terms "shoreside crab processor" or "stationary floating crab processor" as those terms are defined in §680.2.

(5) The phrase "moored within the harbor" as used in Section 122(e)(2) means moored within the harbor of St George Island or St Paul Island, located in the Pribilof Islands as those harbors are defined in NOAA marine charts 16381 and 16382 respectively.

This guidance is issued under the prosecutorial discretion authority inherent to this office. A formal rule making process is expected to be undertaken in the future to refine the above sections. Publication of a formal rule in the Federal Register constitutes constructive notice to all regulated parties of a rule promulgation. Upon publication of a rule addressing the above sections, this guidance is automatically rescinded and may no longer be relied upon.

Garland M, Walker

NOAA Office of General Counsel for Enforcement and Litigation, Alaska Region

APPENDIX B. NOAA GC Response concerning Section 122 (e) Use Caps

April 16, 2007

Joseph T. Plesha
General Counsel, Trident Seafoods Corporation
5303 Shilshole Ave. NW
Seattle, Washington 98107

Re: Crab Processing on St. Paul Island

Dear Mr. Plesha:

This letter responds to your letter of April 9, 2007. In that letter you set out a proposed arrangement whereby a “new” processing company would be independently incorporated and that new processing corporation would lease the one processing plant located on St. Paul Island from the Tanadgusix Corporation, the legal owner of the facility. A consortium of current processors and others would each own a portion of this newly formed processing corporation. This new processing company would then operate the plant and process most or all of the IPQ in the North region.

The concern expressed in your letter is that if an ownership and/or control analysis (see the definition of “affiliation” at 50 CFR 680.2) were applied to this proposed arrangement, then some of the processors that comprise the ownership consortium of this new processing corporation could potentially be considered to be owners of or have a controlling interest in the new corporation. Were this to occur, then the statutory use cap exception recently enacted at Section 122(e)¹ would not apply to any processor considered to own or have a controlling interest in the new corporation.

Your concern is well founded. Under your proposal, if any of the processors that comprise the ownership consortium of this new processing corporation were considered to be owners of or have a controlling interest in the new corporation, then that owner would lose the benefit of Section 122(e). This is because Section 122(e) applies only to “contract processing arrangements.” Below is the analysis that leads to this conclusion.

Section 122(e) states:

¹PL 109-479, HR 5946, January 12, 2007.

(1) IN GENERAL.--Notwithstanding sections 680.42(b)(ii)(2) and 680.7(a)(ii)(7) of title 50, Code of Federal Regulations, custom processing arrangements shall not count against any use cap for the processing of opilio crab in the Northern Region so long as such crab is processed in the Northern Region by a shore-based crab processor.

(2) SHORE-BASED CRAB PROCESSOR DEFINED.--In this paragraph, the term "shore-based crab processor" means any person or vessel that receives, purchases, or arranges to purchase unprocessed crab, that is located on shore or moored within the harbor.

By its specific terms, Section 122(e) applies only to “custom processing arrangements.” No definition of “contract processing arrangement” is available either in the statute or the legislative history of this section. Therefore, the Agency looks to the actual words used by Congress to see if there is a customary usage and meaning of the term “custom processing arrangements.” The customary usage and meaning of the term “custom processing arrangement” involves a processor who is contracted to process crab that the processor does not own or, in this case, in which the processor has no IPQ interest in the crab being processed. However, if the processor is owned or controlled by another party that also owns or holds the IPQ interest in the crab, then this arrangement would not meet the customary usage and meaning of the term “custom processing arrangement.” The processor would then be processing IPQ crab that the processor’s owner owns or in which the processor’s owner holds the IPQ interest; under the affiliation regulations, the processor would be considered to be processing its own crab.

However, you should note that while under your proposal some of the processors that comprise the ownership consortium of this new processing corporation could potentially be considered to be owners of or have a controlling interest in the new corporation, this is only one potential outcome. There may be ways to structure a “firewall” between investors in a processing operation and the amount of control that can be exerted over the owner/operator of the processor by the investors. Any such plan would need to be developed with due regard for the affiliation regulations at 50 CFR 680.2 and would have to be scrupulously implemented.

Lastly, when the rulemaking occurs to draft regulations implementing Section 122(e), you and all of the public will have a full opportunity to provide comments.

Sincerely,

Garland M. Walker
NOAA GCEL/AK