

**REGULATORY IMPACT REVIEW**

**and**

**FINAL REGULATORY FLEXIBILITY ANALYSIS**

**Exemption to West Region Landing Requirement  
in the Western Aleutian Islands Golden King Crab Fishery**

For a Regulatory Amendment to  
Implement Amendment 37 to the Fishery Management Plan for  
Bering Sea and Aleutian Islands King and Tanner Crabs

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## **Executive Summary**

Since the second year of fishing under the Bering Sea and Aleutian Island crab rationalization program, participants in the Western Aleutian Island golden king crab fishery have voiced concerns with processing capacity in the West region of that fishery. Specifically, the program requires that 50 percent of the catcher vessel Class A individual fishing quota (IFQ) (or approximately 24 percent of the non-community development quota program (CDQ) total allowable catch (TAC)) be landed in the area west of 174° West longitude (the West region). Under the program to date, shore-based crab processing in this region has occurred only in a single plant, in a single community, Adak. In the first four years of the program, deliveries to the Adak plant were complicated, as the operator of that plant holds few of the processor quota shares in the fishery. Despite this mismatch, holders of processor shares have largely relied on the plant in Adak for West region processing. Until this year, this reliance on a single plant may have contributed to leaving a portion of the TAC unharvested, as a limit on use of processor shares prevented the entire West region allocation being processed at a single plant. To overcome this obstacle, the Council adopted an amendment to the program, exempting custom processing in the West region from the processor share use caps, which NMFS implemented in 2010.

Although this regulation would resolve any “excessive shares” issue concerning the ability of the Adak plant to process all West region landings from the fishery, in August of 2009, the operator of that plant filed for bankruptcy. This filing prompted participants in the fishery to assert that an exemption from the regional landing requirement should be made available to address a shortage of processing capacity in the West region. In response, the Council recommended that NMFS undertake emergency rulemaking providing a regional landing exemption in the current (2009-2010) season,<sup>1</sup> and has advanced this analysis of Amendment 37 to the crab program that would either provide an exemption from the West region landing requirement, if qualifying interested parties agree to that exemption, or remove the West region landing requirement altogether.

## **Purpose and Need Statement**

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

*The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude. A reliable shoreside processing facility may not be available each season to take delivery and process WAG IFQ. Relaxing the regional landing requirement would allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.*

## **Alternatives**

To meet the identified purpose and need, the Council has adopted the alternatives below for analysis. The Council selected Alternative 2 (with bolded underlined options) as its preferred alternative.

**Alternative 1:** Status Quo (no exemption from West region landing requirements)

### **Alternative 2: Contractually Defined Exemption**

**To receive an exemption from the regional landing requirement in the WAG fishery,**

Option 1: specified QS holders, PQS holders, shoreside processors, and municipalities

**Option 2: specified QS holders, POS holders, and municipalities**

<sup>1</sup> An emergency rule would remain in effect for up to 180 days, resolving the issue for this season. A single extension of up to 185 days would be permitted, if necessary and appropriate, after which normal rulemaking would be needed to address any problem.

**shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.**

**Definitions:**

**OS Holders: Any person or company that holds in excess of** [options: 5, 10, or **20**] **percent of the west-designated WAG OS.**

**PQS Holders: Any person or company that holds in excess of** [options: 5, 10, or **20**] **percent of the west-designated WAG PQS.**

Shoreside Processors: A shoreside processing facility that is located in one of the defined municipalities (Adak or Atka) and that processed in excess [options: 5, 10, or 20] percent of the west-designated WAG IFQ in the preceding fishing year.

**Municipalities: The municipalities of Adak and Atka.**

**Approval of Exemption:**

**An exemption to the regional landing requirement will be granted, if the contracting parties have filed an affidavit with NMFS affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify its approval of the exemption in writing.**

***Effects of the Alternatives***

The following subsections summarize the effects of the alternatives under consideration in this action.

**Effects of the status quo (alternative 1)**

Under the status quo, no exemption from the West region landing requirement exists. Currently, the only crab processing shore-based capacity in the West region is in Adak. If processing capacity in the West region is not accessible to PQS holders, landings in that region cannot occur. From the perspective of holders of West region IFQ, if the holder of matched individual processor quota (IPQ) fails to make available processing capacity in the West region to receive a delivery, that IFQ holder may be unable to harvest and make delivery of its allocation. In such a circumstance, the IFQ holder's only recourse is to pursue arbitration of the delivery terms. Since arbitration has not been used, to date, for this purpose in any fishery, it is not clear what the outcome of such a process might be. An arbitrator can establish a contract between the IFQ holder and IPQ holder, defining delivery terms for the IFQ harvests. If an IPQ holder fails to perform, the IFQ holder could pursue a civil action against the IPQ holder for a violation of the contract, all of which impose direct litigation costs, personal and financial stresses, and, possibly, foregone fishing time.

Under the status quo, IFQ holders are likely to continue to be frustrated, and their commercial aspirations thwarted until consistently operational and accessible shore-based processing capacity is made available to receive their deliveries. It is important to recognize that this outcome depends on several factors. Even if processing capacity is available in the West, if that capacity is not owned or controlled by the PQS holders, IFQ holders may continue to face uncertainties. Disputes between the operators of the Adak plant and other IPQ holders have delayed landings in the past. Even if IPQ holders have access to the shore-based plant's processing capacity, delivery arrangements will still need to be negotiated. Processors in the fishery have raised concerns that dispersed deliveries drive up their operating costs and, thus, reduce the net value of the processed product. Whether operating processors will choose to follow the harvesters preferred delivery schedules (without being compelled to do so by an arbitration determination) is not known.

Overall, IPQ holders are likely to continue to use shore plants in the West region, when those facilities are available and willing to process crab at a reasonable cost under a custom processing arrangement or pay reasonable IPQ lease fees. Currently, the only West region shore plant likely to operate is the plant in Adak. Its future depends in part on whether arrangements can be made, either to have Adak Seafood stay or have another processor operate the plant. The success of reopening the plant will likely depend, in large part, on groundfish availability in the area. In the future, it is possible, although not presently anticipated, that a crab processing shore plant could be opened in Atka, but whether investment in such a facility will occur, making shore-side delivery opportunity operational in the foreseeable future is not known.

The most likely community beneficiaries of the West region landing requirement are Adak and Atka, but whether they realize any benefit will depend on the choices of IFQ holders, IPQ holders, and plant operators. Only Adak appears likely to benefit from West regionalization in the near future, as it is home to the only operational crab processing facility. Yet, the uncertainties surrounding the operation of the plant in that community and potential competition from other plants that could be introduced bring any potential community benefits into question. In the long run, it is possible that Atka would benefit from the status quo, West region landing requirement. The owner of the small plant currently operating in Atka holds substantial West region PQS, which would ensure a reliable supply of West region landings, if the plant began accepting crab deliveries. The owner has considered developing crab processing at the plant, but currently has no firm plan for developing that capacity. The failure of a major PQS holder to develop capacity in the region supports the conclusion that multiple operations capable of processing crab cannot be supported in the region.

#### **Effects of the agreed exemption alternative (alternative 2 – the preferred alternative)**

Under the action alternative, an exemption to the regional landing requirement would be permitted on the agreement of certain QS holders, PQS holders, communities, and possibly plant operators. Under options considered by the Council, the required QS holders and PQS holders could include any individual entity holding in excess of a designated threshold percentage of the respective West region share pool (i.e., 5 percent, 10 percent, or 20 percent). The Council identified the 20 percent threshold for both QS and PQS for inclusion in its preferred alternative. Currently, 8 persons hold West region QS, while 6 persons hold West region PQS. Of these, only 1 holds shares in excess of the 5 percent and 10 percent thresholds, while only 2 hold in excess of the preferred 20 percent threshold, for each share type. Notably, the “previous” Adak plant operator meets only the two lower PQS thresholds, but does not exceed the 20 percent preferred PQS threshold. Under the options defining the exemption, persons below the threshold would have no direct input into whether the exemption could be accessed. It is not known whether some of these share holders could exert influence on others who control the exemption.

In general, QS holders are likely to pursue the exemption, if they perceive a cost to complying with the West region delivery requirement. In general, these QS holders assert that making deliveries in the West region is less costly, as any plant in the West region will be closer to the grounds. Yet, costs could be higher, if a West region plant was not open at opportune times, offloaded too slowly, was not able to reliably schedule deliveries, or could not reliably pay for landings. As with QS holders, operational and cost considerations are likely to affect any decision of a PQS holder to pursue an exemption. If PQS holders perceive a higher net cost associated with processing in the West region, they are likely to pursue an exemption; however, in the long run, a different dynamic could arise among PQS holders. If a PQS holder that is a required party to the exemption decides to process in the West, that PQS holder is likely to withhold consent to the exemption and work to extract as much value as possible from other PQS holders as a part of any negotiation for the processing of their IPQ. The PQS holders most likely to operate in the West are 1) the CDQ representative of Atka, who is the largest PQS holder in the fishery, and 2) the operator of the Adak plant. While these operations could be beneficial to a community (as is intended by the regional landing requirement), it is possible that a mobile plant could operate outside of any

community, thus providing no “direct” benefit to any community in the region. Indirect benefits would accrue through several mechanisms. First, QS could be harvested and sold locally (i.e., in the West region) that otherwise might not be utilized. Second, given substantial QS and PQS are held by West region entities, the economic activity provided by the expansion of Western Aleutian Island golden king crab fishing (e.g., employment of vessel capital and crew) will accrue to regional interests. Third, additional deliveries means additional tax revenues a portion of which would be realized by local regional communities.

The option of requiring any shore plant that processes in excess of a threshold of the prior year’s West designated landings could be used to ensure that a shore plant operator in the region can prevent an arrangement among other parties to circumvent the regional delivery requirement and use other landing options for negotiating leverage. Since typically only a single processor has operated in the West, it is unlikely that the level of the threshold will exclude any facility that operated in the previous year. The shore plant requirement may be over-inclusive in some circumstances, and under-inclusive in others. If a plant operator that has previously operated in the region is uncertain of whether it will operate in a given year, it is unlikely to agree to an exemption, in order to maintain its position in the fishery, should it decide to operate. On the other side, a new plant may be planning to enter the fishery (and be fully capable of opening), but have no ability to ensure that landings in the region will be required, as it will have no say in the exemption decision. While QS holders maintain that a plant in the West would have operational benefits for vessels harvesting in the fishery, it is unlikely that a West region plant can operate as efficiently as plants outside of the West region. Whether QS holders would deny the exemption in support of such a new plant is uncertain, and could depend on whether PQS holders are willing to share any efficiency benefits realized as a result of the exemption with the fishermen. So, assuming that the purpose of including shore plant owners in the exemption decision is to ensure that the exemption is not available, if any West region facility is operational, it is not clear that the exemption will not be approved and instituted, even if a new plant is opening in the region.

Making the communities of Adak and Atka required parties to the contract could aid any development of shore plant capacity in those communities by allowing the communities to intervene on their own behalf. The provision would require local governments to consent to the exemption. In most cases, it can be anticipated that these representatives will act on behalf of local plants, withholding consent to an exemption to foster local deliveries. Yet, in some circumstances, it is possible that political considerations or competing interests could lead some community representatives to consent to an exemption, against the interests of a local plant operator. While inclusion of community interests as required parties may not always protect community-based plants, community participation in the agreement could be critical to ensuring that some regional benefit arises from West regionalization. Without requiring community agreement, it is likely that harvesters and processors would agree to the exemption, based solely on their returns from the fishery.

The exemption would generally be established by an annual agreement of the required parties. Once those parties file an affidavit with NMFS, affirming the existence of such a contract, the exemption would be granted. The exemption is granted only if the required parties agree to the exemption. Between harvesters and processors, it is probable that each party would use its required consent for negotiating leverage. While this provision can be administered in a straightforward manner, the option provides no certainty to participants in the fishery. Since no deadline for filing the exemption is provided, it is assumed that the exemption could be made available at any time, if the parties filed the agreement. This degree of flexibility may be beneficial in that it would allow parties to wait to determine if processing capacity could be made available in the region, prior to establishing the exemption.

Overall, the effect of the exemption will depend on the parties’ choices. Each required party to the contract is free to determine whether to accede to the exemption. The exemption will be agreed to, when

all parties see it in their interest to go along with the exemption. Whether a party may try to extract some benefit from the other parties is fully within its discretion. To the extent that there is turnover in required parties (either through transfers of QS or PQS or changes in community representation), the motivation of those parties may change, along with the results of the exemption vote. Consequently, whether the exemption serves its intended purpose is uncertain and may vary over time.

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# 1 INTRODUCTION

Since the second year of fishing under the Bering Sea and Aleutian Island crab rationalization program, participants in the Western Aleutian Island golden king crab fishery have voiced concerns with processing capacity in the West region of that fishery. Specifically, the program requires that 50 percent of the catcher vessel Class A IFQ (or approximately 24 percent of the non-CDQ TAC) be landed in the area west of 174° West longitude (the West region). Under the program, to date, shore-based crab processing in this region has occurred only in a single plant, in a single community, Adak. In the first four years of the program, deliveries to the Adak plant were complicated, as the operator of that plant holds few of the processor quota shares in the fishery. Despite this mismatch, holders of processor shares have largely relied on the plant in Adak for West region processing. Until this year, this reliance on a single plant may have contributed to leaving a portion of the TAC unharvested, as a limit on use of processor shares prevented the entire West region allocation being processed at a single plant. To overcome this obstacle, the Council adopted an amendment to the program, exempting custom processing in the West region from the use processor share caps, which NMFS implemented in 2010.

Although this regulation would resolve any excessive share issue concerning the ability of the Adak plant to process all West region landings from the fishery, in August of this year, the operator of that plant filed for bankruptcy. This filing prompted participants in the fishery to assert that an exemption from the regional landing requirement should be available to address a shortage of processing capacity in the West region. In response, the Council recommended that NMFS undertake emergency rulemaking providing a regional landing exemption in the current (2009-2010) season<sup>2</sup> and has advanced this analysis of Amendment 37 to the crab program that would provide an exemption from the West region landing requirement, in the event that qualifying interested parties agree to that exemption.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of alternatives to establish an exemption from West region landing requirements in the fishery. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.<sup>3</sup>

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

## 2 REGULATORY IMPACT REVIEW

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

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

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<sup>2</sup> An emergency rule would remain in effect for up to 180 days, resolving the issue for this season. A single extension of up to 185 days would be permitted, if necessary and appropriate, after which normal rulemaking would be needed to address any problem.

<sup>3</sup> The proposed action is a minor change to a previously analyzed and approved action and the proposed change has no effect individually or cumulatively on the human environment (as defined in NAO 216-6). The only effects of the action are the effects on the geographic distribution of landings. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

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

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

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

## **2.1 Purpose and Need Statement**

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

*The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude. A reliable shoreside processing facility may not be available each season to take delivery and process WAG IFQ. Relaxing the regional landing requirement would allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.*

## **2.2 Alternatives**

To meet the identified purpose and need, the Council has adopted the alternatives below for analysis. The Council selected Alternative 2 (with bolded underlined options) as its preferred alternative.

**Alternative 1:** Status Quo (no exemption from West region landing requirements)

### **Alternative 2: Contractually Defined Exemption**

**To receive an exemption from the regional landing requirement in the WAG fishery,**

Option 1: specified QS holders, PQS holders, shoreside processors, and municipalities

**Option 2: specified QS holders, PQS holders, and municipalities**

**shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.**

**Definitions:**

**QS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG QS.**

**PQS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG PQS.**

Shoreside Processors: A shoreside processing facility that is located in one of the defined municipalities (Adak or Atka) and that processed in excess [options: 5, 10, or 20] percent of the west-designated WAG IFQ in the preceding fishing year.

**Municipalities: The municipalities of Adak and Atka.**

**Approval of Exemption:**

**An exemption to the regional landing requirement will be granted, if the contracting parties have filed an affidavit with NMFS affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.**

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

In addition to the above alternatives, the Council considered a variety of other approaches to addressing the problem identified in the purpose and need statement. The Council considered an exemption that would be available only after a factual finding of the absence of processing capacity. This provision could be administered either directly by NMFS or by an arbitrator selected by the interested parties. The Council elected not to advance these alternatives, as factual findings of the absence of processing capacity may be administratively unworkable. With mobile processing platforms, capacity availability can change in a relatively short time period. Making determinations of the availability of capacity may not be possible, given the potential for short term changes in capacity.

The Council also considered a provision under the action alternative that would have prohibited any party required to consent to the exemption from unreasonably withholding consent to the exemption. The proposed provision would have been administered by an arbitrator jointly selected by the required parties. Although such a provision might be desirable, as it would prevent persons from barring the exemption without legitimate reason, the provision would also likely be unadministerable. Even with an arbitrator, NMFS would be required to provide the interested parties with the opportunity to appeal any arbitrator decision. Under the appeal, NMFS would be required to make a *de novo* finding (i.e., an original finding without deference to the arbitrator's decision). As a result, the use of an arbitrator may delay the final decision on the granting of the exemption. In addition, NMFS may be unable to expeditiously process any claim, if factual matters are disputed. To accommodate time constraints associated with contesting a party's withholding consent to an exemption, a timeline for application for the exemption would need to be developed. This timeline would limit flexibility and could prevent the exemption from achieving its intended purpose.

The Council also elected not to advance an alternative to remove the West region landing requirement altogether. Since the West region landing requirement is intended to induce the development of processing in the region, when such development is feasible, removal of the exemption would be inappropriate.

### **2.3 Existing Conditions**

The section provides a brief discussion of the relevant conditions in the fishery. The section begins with a brief discussion of the pre-program License Limitation Program (LLP) fishery.

### 2.3.1 The LLP fishery

Prior to implementation of the rationalization program, the Bering Sea and Aleutian Island crab fisheries were managed under the License Limitation Program (LLP). Under that program, 28 licenses carried endorsements authorizing participation in the Aleutian Islands golden king crab fisheries (including the Western fishery). Despite a relatively constant TAC leading up to implementation of the rationalization program, the license limits were not constraining and the fishery did not attract the level of competition of other crab fisheries (see Table 1). The fishery's small TAC and distant and relatively limited grounds are believed to have been an effective deterrent to entry to those qualified under the LLP.

**Table 1. TACs, catch, and participation by operation type in the Western Aleutian Islands golden king crab fishery (2000/1 through 2008/9 seasons).**

Season	TAC	Catch	Percent of TAC harvested	Number of vessels		
				catcher vessels	catcher processors	all unique vessels
2000 - 2001	2,700,000	2,902,518	107.5	11	1	12
2001 - 2002	2,700,000	2,693,221	99.7	8	1	9
2002 - 2003	2,700,000	2,605,237	96.5	5	1	6
2003 - 2004	2,700,000	2,637,161	97.7	5	1	6
2004 - 2005	2,700,000	2,639,862	97.8	5	1	6
2005 - 2006	2,430,006	2,382,468	98.0	2	1	3
2006 - 2007	2,430,005	2,002,186	82.4	2	1	3
2007 - 2008	2,430,005	2,246,040	92.4	2	1	3
2008 - 2009	2,551,500	2,252,111	88.3	2	1	3

Sources: ADFG fishtickets and NMFS RAM catch data (for 2005-2006, 2006-2007, 2007-2008, and 2008-2009)

Despite relatively low participation levels in the years leading up to implementation of the rationalization program, the fishery did exhibit signs of increased effort. Seasons progressively shortened during this time period (see Table 2).

**Table 2. Season opening and closings in the Western Aleutian Islands golden king crab fishery (2001/2 through 2004/5 seasons).**

Season	Season opening	Season closing
2001 - 2002	August 15	March 30
2002 - 2003		March 8
2003 - 2004		February 2
2004 - 2005		January 3

Sources: ADFG Annual Management Report.

### 2.3.2 The rationalization program fishery

Nine Bering Sea and Aleutian Island crab fisheries are managed under the rationalization program. Under the program, holders of License Limitation Program (LLP) licenses endorsed for a fishery were issued

vessel owner quota shares (QS), which are long term access privileges, based on their qualifying harvest histories in that fishery. Catcher processor license holders were allocated catcher processor vessel owner QS for their history as catcher processors; catcher vessel license holders were issued catcher vessel QS based on their history as a catcher vessel. QS annually yield IFQs, 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 IFQs to harvest 1 percent of the annual TAC in the fishery. Ninety percent of the catcher vessel owner IFQs is issued as “A shares” or “Class A IFQ,” which must be delivered to a processor holding unused IPQs.<sup>4</sup> The remaining 10 percent of these annual IFQs are issued as “B shares” or “Class B IFQ,” which may be delivered to any processor.<sup>5</sup> Processor quota shares (PQS) are long term privileges 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.<sup>6</sup>

In addition to processor share landing requirements, Class A IFQ (along with IPQ) are, under the program, subject to regional landing requirements, under which harvests from those shares must be landed in specified geographic regions. For the Western Aleutian Islands golden king crab fishery, 50 percent of the Class A IFQ is undesignated, which means that it can be delivered to any processor with corresponding IPQ and 50 percent is designated for delivery in the West region, which is west of 174° W longitude, to any processor with corresponding West designated IPQ.

Under the rationalization program, quota shares were allocated based on historical harvesting activity in the fishery. With few participants having such history, initial allocations of QS were very concentrated, and have remained very concentrated (see Table 3). Regional designations were assigned to all QS initial allocations, with half of the total allocation being designated for landing in the West region and the other half undesignated (allowing their landing in any location). Regional designations were applied to QS during the initial allocation, based on landings histories, but adjustments were necessary as substantially less than 50 percent of the historical landings were made in the West region. The West designation was intended primarily to aid the development of processing in the community of Adak. Adak had little historic processing prior to the end of the qualifying period, as the community was occupied exclusively by the U.S. military during the development of the Aleutian Island commercial fisheries. With the departure of the military in the late 1980s, the community has worked to develop civilian industries, including fish processing. Atka is recognized as a second *potential* beneficiary of the West region designation. That community has also begun to develop fish processing capacity in recent years, but has yet to develop crab processing capability.

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<sup>4</sup> 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.

<sup>5</sup> The terms “A share” and “Class A IFQ” are used interchangeably in this paper, as are the terms “B share” and “Class B IFQ”

<sup>6</sup> Although 90 percent of IFQ issued each year is 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 (i.e., are not allocated B shares). The rationale for issuing only A shares to PQS holders and their affiliates is that these entities do not need the extra negotiating leverage derived from B shares. To maintain 10 percent of the aggregate 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).

**Table 3. Quota share holdings by share type, region, and operation type in the Western Aleutian Islands golden king crab fishery (2007-2008).**

Share type	Share holdings by region and operation type						Across regions and operation types			
	Region/Catcher processor	QS holders	Percent of pool	Mean holding	Median holding	Maximum holding	QS holders	Mean holding	Median holding	Maximum holding
Owner Quota Shares	Undesignated	13	26.9	2.1	1.0	11.0	16	6.25	1.74	45.73
	West	9	26.9	3.0	1.3	13.5				
	Catcher processor	3	46.2	15.4	0.5	45.7				
Crew Quota Shares	Catcher vessel	8	57.5	7.2	5.6	21.7	9	11.11	6.17	41.74
	Catcher processor	2	42.5	21.3	21.3	41.7				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2007-2008.  
 Note: These share holdings data are publicly available and non-confidential.

As would be expected in this relatively small fishery, PQS holdings are relatively concentrated, with only 10 PQS holders (see Table 4). Initial allocations of PQS were made based on processing history in the fishery. Processors operating plants in the West region at the time of the initial allocation received their allocations in West designated PQS, while others received their allocations as both West designated PQS and undesignated PQS, in a proportion such that the pool of PQS was divided equally between West designated PQS and undesignated PQS. To some extent, holdings are concentrated by area with a single holder having in excess of 50 percent of the West designated shares and three holders controlling in excess of 95 percent of the shares in that region. This level of concentration would typically benefit share holders, by allowing consolidation of processing activity. In the first four years of the program, complete consolidation of West region processing activity was prevented by the processing share cap, which permitted no more than 30 percent of the pool from being held by or processed at the facility of a single person. An exemption from that cap now allows unlimited processing at a single facility in the West region (including the processing of all landings with undesignated shares).

**Table 4. Processor quota share holdings by region in the Western Aleutian Islands golden king crab fishery (2009-2010).**

Region	Share holdings by region					Overall share holdings			
	Number of PQS holders	Percent of pool	Mean holding	Median holdings	Maximum holdings	Number of PQS holders	Mean holding	Median holdings	Maximum holdings
Undesignated	8	50	6.3	1	29.6	10	10	6.8	30
West	6	50	8.35	2.8	26.35				

Source: NMFS Restricted Access Management Database (2009-2010)  
 Note: These data are publicly available and non-confidential

The few QS holders in the fishery have used measures provided by the rationalization program to concentrate activity in the fishery beyond their QS holdings. Exclusive allocations have been organized in harvest cooperatives, reducing the fleet to two catcher vessels and a single catcher processor, all of which have fished only cooperative allocations. In each of the first five years of the program, in excess of 99 percent of the annual IFQ has been allocated to cooperatives that have formed in the fishery. Gains arising from IFQ are also suggested by the changes in pot usage, pot lifts, and catch per unit effort in the fishery (see Table 5). In the first three years of the program, the number of registered pots per vessel has increased substantially, but the number of pot lifts in the fishery has fallen. Catch per unit effort has also risen substantially, suggesting that participants' use greater numbers of pots and allowing those pots to soak for longer periods.

**Table 5. Pot usage and catches in the Western Aleutian Islands golden king crab fishery (2000/1 through 2007/8).**

Season	Number of pots registered*	Number of pot lifts *	Lifts per registered pot*	Average catch per unit effort (crabs per pot lift)*	Pots per vessel	Pounds per pot	Deadloss* (in pounds)	Deadloss per pound of catch
2000 - 2001	8,910	101,239	11.4	7	743	28.7	53,158	0.018
2001 - 2002	8,491	105,512	12.4	7	943	25.5	43,519	0.016
2002 - 2003	6,225	78,979	12.7	8	1,038	33.0	32,101	0.012
2003 - 2004	7,140	66,236	9.3	10	1,190	39.8	49,321	0.019
2004 - 2005	7,240	56,846	7.9	12	1,207	46.4	43,560	0.017
2005 - 2006	4,800	27,503	5.7	21	1,600	86.6	26,500	0.011
2006 - 2007	6,000	22,694	3.8	20	2,000	88.2	19,768	0.010
2007 - 2008	4,800	25,287	5.3	21	1,600	88.8	23,183	0.010

Sources: \*ADFG Annual Management Report and \*\*fishtickets and \*\*NMFS RAM catch data (for 2005-2006, 2006-2007, and 2007-2008)

As might be expected, since implementation of the program, catcher vessel fishing has been extended over a longer period of time (see Table 6). Substantial time periods between landings (or breaks in fishing) appear to have developed. QS holders in the fishery assert that the large spreads between the first delivery and the last deliveries in the second and third years arise largely from the lack of available processing capacity in the West region. These QS holders assert that landings during the second and third years were delayed because participants relied on the shore plant at Adak to handle processing in the West region of the fishery, rather than establishing alternative platforms to support West region landings. Prolonged negotiations concerning processing arrangements between IPQ holders and the Adak processor are said to have delayed processor availability during those two years.

**Table 6. Seasons and deliveries in the Western Aleutian Islands golden king crab fishery (2005/6 through 2008/9).**

Season	Season opening	Date of first delivery	Date of last delivery	Season closing
2005-2006	August 15	September 6	March 25	May 15
2006-2007		September 10	May 6	
2007-2008		September 14	May 21	
2008-2009		September 15	May 12	

Source: RAM IFQ landings data

While landings have been spread over a relatively long time period, the West region IFQ allocation is relatively small and is unlikely to support any extended fishing period (see Table 7). In each of the first four seasons of the program, 2 catcher vessels fished in the fishery. These vessels made between 2 and 9 landings in the West region in this time period. Given that over 80 percent of the total IFQ allocation in the fishery was harvested in each of these years (and over 90 percent of the total IFQ allocation in two years), it is unlikely that the West region allocation would require over 10 deliveries (absent any great increase in the TAC). Even if a West region plant were to attract a substantial share of the undesignated IFQ deliveries, the fishery is unlikely to produce much more than 20 landings in a season for that plant.

**Table 7. Active catcher vessels, West region IFQ landings, and West region IFQ allocations (2005-6 to 2009-2010).**

Season	Number of active catcher vessels	Number of landings of West region IFQ	West region IFQ allocations
2005-2006	2	9	570,932
2006-2007	2	2	570,932
2007-2008	2	5	570,932
2008-2009	2	4	599,474
2009-2010			599,475

Source: NMFS Restricted Access Management IFQ database.

Crab markets in general suffer from great volatility. First wholesale prices for golden king crab show a notable decline in 2006, the first full year after implementation of the rationalization program (Table 8).<sup>7</sup> This drop coincided with an abundance of competing small sized red king crab imports. In the second and third years following implementation of the program, king crab inventories were depleted, which together with a relatively strong Japanese market, led to increases in golden king crab prices. Since that time, the weakness of the global economy and, more specifically, crab markets (particularly large retail and food service markets) are believed to have led to slightly lower prices. Indications are that this trend will continue, leading to prices near the 2006 level, which approached historical lows. Based on his market analysis, Sackton (2009) expressed concern that further declines in the value of golden king crab could make it “not economical to harvest the entire quota.”

**Table 8. Estimated golden king crab ex vessel prices and first wholesale price, 2001 - 2006 (dollars/pound).**

Year	Ex vessel price	First wholesale price
2001	3.37	6.95
2002	3.46	7.58
2003	3.62	7.89
2004	3.15	6.02
2005	2.89	6.00
2006	1.92	4.35
2007	2.16	5.34
2008	3.58	5.75

Source: ADFG Commercial Operators Annual Report

Note: Excludes Southeast plants.

Throughout the first four years of the program, the 30 percent processing share use cap prevented any single plant from processing all of the West region IPQ deliveries. Since the beginning of the fifth season (2009-2010), the use cap exemption, applicable to custom processing, has removed this regulatory impediment to a single processor receiving all West region IPQ deliveries. Although the exemption is

<sup>7</sup> Final price data are available from State of Alaska Commercial Operators’ Annual Reports for the various species harvested in the program. 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 lower prices in the most recent years, which accurately characterizes price changes reported by participants in the fishery.

intended to resolve uncertainties concerning availability of processing capacity in the West region, the lack of capacity has persisted. Share holders in the fishery assert that this lack of capacity is caused by the circumstances surrounding the Adak plant.

Adak Fisheries reportedly stopped all processing at the plant after the 2009 Federal Pacific cod B season and shortly after the start of the State waters Pacific cod A season (mid-April). The plant is currently in “hibernation mode,” running off of limited power. In early September, Adak Fisheries officially filed for Chapter 11 bankruptcy.<sup>8</sup> The company had several unpaid creditors, with debt totaling several million dollars. The United States Bankruptcy Court for the District of Alaska (the Court) scheduled a hearing for November 9, 2009, in Anchorage, to consider the sale of the Adak plant and related assets to a new company, Adak Seafood, LLC.<sup>9</sup> The proposed sale would include Adak Fisheries’ fish processing equipment and other personal property housed in a building owned by Aleut Enterprises and leased to Adak Fisheries. Adak Seafood, LLC, is a newly-formed Delaware limited liability company, affiliated with Drevik International. Kjetil Solberg, former owner of Adak Fisheries, is the majority (51%) owner of the company, and Drevik owns 49%.<sup>10</sup> The offer from Adak Seafood is \$488,000, plus assumption of the debtor’s entire obligation to its primary creditor, Independence Bank, of approximately \$6.7 million. The sale is to be free and clear of the claims, liens, and interests of all persons receiving notice of the motion, except Independence Bank; and the claims, liens, and interests of all such persons (excluding Independence Bank) shall attach to the sale proceeds to the same extent and in the same order of priority as existed in the underlying property.

On November 5, 2009, Aleut Enterprises, LLC, filed an objection with the Court regarding the proposed sale of Adak Fisheries. Aleut Enterprises’ lease to Adak Fisheries was scheduled to expire on December 31, 2009. Aleut Enterprises objected to the sale on several grounds, asserting, in part, that the terms of the Sale Application cannot be met, as Aleut Enterprises’ lease was terminated pre-petition. Aleut Enterprises also objected to the sale on the grounds that the lease would expire on December 31, 2009, and that the deadline for extending the lease had passed.<sup>11</sup>

The hearing for the sale of Adak Fisheries’ assets was held on November 9 and 10, and on November 10, 2009, the Court approved the sale to Adak Seafood, LLC, with the original terms of the offer, and including other provisions.<sup>12</sup> One provision requires that at closing, Adak Seafood shall pay \$250,000 to Aleut Enterprises, LLC, for rent due in 2009 and property damage. Adak Seafood is also required to escrow \$150,000, which is supposed to represent six months of the minimum annual rent due to Aleut Enterprises for 2010. In addition, Adak Seafood is required to pay \$13,000 to the City of Adak to satisfy sales tax obligations. Aside from the primary creditor (Independence Bank), there are several other entities whose claims and liens do not attach to the sale. These, include but are not limited to, the IRS, State of Alaska, the City of Adak, and Pentech Leasing.<sup>13</sup> Overall, Adak Fisheries was several millions of dollars in debt, and all but a little over \$7 million was removed through the bankruptcy proceedings, as the new company (Adak Seafood LLC) will assume the \$6.7 million owed to Independence Bank. The total sale, including the debt to Independence Bank and other various expenses, was about \$8 million. The order granting the sale notes that the only other offer or expression of interest in the plant was by Trident

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<sup>8</sup>Source: Seafoodnews.com.

<sup>9</sup>Case No. 09-00623 DMD, United States Bankruptcy Court for the District of Alaska, October 9, 2009.

<sup>10</sup>Testimony by Drevik at November 10, 2009, hearing on Case No. 09-00623 DMD.

<sup>11</sup>Aleut Enterprises, LLC’s Objection to Debtor’s Motion to Sell Adak Fish Plant, Case No. 09-00623 HAR, U.S. Bankruptcy Court for the District of Alaska, November 5, 2009.

<sup>12</sup>For details, see Order Granting Debtor’s Application to Sell Adak Plant Free and Clear of Liens, Case No. 09-00623 DMD, U.S. Bankruptcy Court for the District of Alaska, November 10, 2009.

<sup>13</sup>Pentech Financial Services, Inc., is the successor company to Pentek Leasing, which is a general equipment lessor for small and mid-ticket equipment.

Seafoods Corporation, which expressed an interest in purchasing certain assets, and after adjustment for differences between the two offers (Adak Seafood and Trident Seafoods), Adak Seafood's offer was millions of dollars higher. Trident Seafoods offered \$2 million for the assets of Adak Fisheries, and its offer did not include assumption of the \$6.7 million of debt owed to Independence Bank.<sup>14</sup>

Under the order, the terms of the lease of the building, from Aleut Enterprises to the new owner, Adak Seafood, stayed the same. Under its terms, the lease was scheduled to expire on December 31, 2009. In October, Independence Bank filed a complaint in Bankruptcy Court requesting an injunction to compel Adak Fisheries to exercise an extension of the lease and Aleut Enterprises to accept that extension.<sup>15</sup> The sale order does not resolve this issue, as it specifically states that all parties reserve all rights with respect to the lease. With the lease expiring, by its terms, at the beginning of 2010, the Aleutian Enterprises filed a complaint to evict Adak Seafood. The parties settled that lawsuit in October of 2010, agreeing to a new lease, the terms of which are not known. In November of 2010, one of the primary investors in Adak Seafood is reported to have stopped financing the company and attempts to locate alternative financing have yet to be successful. Given these circumstances, it remains uncertain whether a shore-based plant will be operational in Adak in the near- or long-term future.

Although the disposition of the bankruptcy of Adak Fisheries has contributed to uncertainties concerning processing capacity in the West region, processing capacity in the West region has been an issue since the opening of the fishery. In the first year of the program the Adak plant and a floating processor accepted deliveries in the West region. Since then, no plant other than the Adak plant has received West region deliveries of crab. Harvesters have asserted that they have been prevented from planning fishing, as negotiations between the Adak plant operator and IPQ holders have lasted well into the season. Harvesters also did not fully harvest the IFQ in the fishery in the second, third, or fourth years of the program, arguably because of the processor share use cap constraining processing at the Adak plant and a lack of any other available processing capacity in the West region. Notwithstanding these circumstances, it is not clear that the IFQ holders have used tools provided by the program that could assist them.

No binding arbitration actions have taken place in the fishery in the first four years of the program. In the current season, IFQ holders are believed to have maintained their right to arbitrate under the lengthy season approach, but have not initiated any proceedings to date. Some harvesters have suggested that they have avoided use of the arbitration system because they believe it will be ineffective and could hurt their positions in the fishery. These participants believe that the adversarial nature of arbitration proceedings could damage relationships between the sectors in the fishery. While it is clear that the system is adversarial and might stress relationships, it is unclear whether use of the system would damage relationships as contended. The system has been used effectively in other fisheries. While it has stressed relationships among participants at times, it is not believed to have had long term detrimental effects on those relationships beyond those that have arisen in other delivery disputes. In actuality, the use of the arbitration system in those other fisheries might be argued to have had a positive effect on relationships, since it has clarified expectations. In addition, it is asserted that the arbitration system may be ineffective in ensuring that processing is undertaken, because IPQ holders have used custom processing relationships to process landings in the region. It is clear that an arbitrator is likely to have no authority to compel a plant processing under a custom processing relationship to accept any delivery. The arbitrator is also unlikely to have authority to compel an IPQ holder to accept a delivery. Regardless of who is engaged in the physical processing of the delivery, the arbitrator's only authority is to establish a contract that binds both the IFQ holder and IPQ holder. Any failure to comply with that contract would be enforceable only

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<sup>14</sup>Memorandum Regarding Potential Acquisition, No. 09-00623 DMD, U.S. Bankruptcy Court for the District of Alaska, November 5, 2009.

<sup>15</sup>Independence Bank v. Adak Fisheries, LLC, et al., Adversary Proceeding No. 09-90031, filed October 15, 2009.

through a civil action. So, an IPQ holder's failure to perform could be grounds for damages against that IPQ holder. Although the IFQ holder may have no action against the plant processing under the custom processing arrangement, it is unclear how the IFQ holder is disadvantaged, since the suit could be pursued against the IPQ holder. In addition, given the prevalence of custom processing in all fisheries under the program, it is unclear how this differs from the circumstances in any other fishery. In those other fisheries, the arbitration system has effectively protected IFQ holder interests.

### **2.3.3 Communities**

Based on current conditions in the fisheries, two communities in the West region are potentially affected by this action: Adak and Atka. This section briefly profiles these communities, as they are the intended beneficiaries of the West region designation.<sup>16</sup>

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, made by 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.

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 Atka 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

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<sup>16</sup> Outside of the West region, communities that maintain crab processing could be affected. These include Dutch Harbor, Akutan, King Cove, and Kodiak. Profiles of these communities are omitted from this analysis, as these communities are likely to be affected in a relatively minor way, if at all. Profiles of these communities are available in EDAW (2005).

regionalization of the Western Aleutian Islands golden king crab fishery in the crab program, the Council was aware that Atka could 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.

### **2.3.4 Emergency rulemaking**

In response to the current circumstance, the Council has recommended that NMFS advance emergency rulemaking under Section 305(c) of the Magnuson Stevens Fishery Conservation and Management Act to address the emergency that has arisen because of the shortage of processing capacity in the West region. Under that section, the Secretary, on finding an emergency, may promulgate regulations necessary to address the emergency. NMFS policy guidelines provide that the only prerequisite for acting is that an emergency must exist and that rulemaking can be justified by economic emergencies. Emergency rule making is intended for circumstances that are "extremely urgent" where "substantial harm to or disruption of the...fishery...would be caused in the time it would take to follow standard rulemaking procedures." The Council concluded that the current fishery is disrupted as no feasible processing capacity will be available this season in the West region and that the result will be substantial economic harm to fishery participants unable to prosecute the fishery in compliance with the West region landing requirement. The guidance cautions that, "[c]ontroversial actions with serious economic effects, except under extraordinary circumstances should be undertaken through normal notice-and-comment rulemaking." The Council received no testimony in opposition to emergency rulemaking, suggesting that the action would be non-controversial. Since normal notice-and-comment-rulemaking would be ineffective for addressing this year's circumstance, the Council determined that emergency rulemaking was the only available avenue to address this situation. In addition, the Council concluded that the circumstances are extraordinary, as the unanticipated closure of the Adak plant leaves harvesters in the fishery without an alternative market for landings in the region.

To further clarify the scope of emergencies to which this authority applies, the guidance defines an emergency as "a situation that:

- 1) results from recent, unforeseen events or recently discovered circumstances;
- 2) presents serious conservation or management problems in the fishery; and
- 3) can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rule making process."

The Council concluded that:

- 1) the first criterion is met, as the unforeseen bankruptcy and closure of the Adak plant prevent deliveries at that facility.
- 2) the second criterion is met, as the West region landing requirement is the management problem that directly prevents prosecution of a portion of the fishery. In the absence of that requirement, landings could be made in operational processing facilities outside the West region (such as Dutch Harbor).
- 3) the third criterion is met, as the removal of the West region landing requirement will address the problem, providing a clear and direct benefit to fishery participants, who would otherwise be unable to complete the harvest of allocations designated for West region landing. The normal rulemaking process is the preferred avenue for making regulatory changes, as it provides interested parties the full ability to comment. In this case, the Council believes that the cost of lost harvests and the accompanying economic dislocation in fishery dependent communities

outweigh the benefit of using the more protracted, standard regulatory development process that would be ineffective for addressing the immediate issue.

Given the absence of processing capacity in the West region, the Council determined that emergency rulemaking was warranted and that without emergency rulemaking a substantial portion of the fishery will likely remain unharvested to the detriment of all participants.

In October 2009, fishery participants petitioned the Council for approval of an emergency rule to suspend the regional designation for the 2009/2010 WAG fishing season. At the December 2009 meeting, the Council recommended emergency action due in part to public testimony that alternative processing capacity in the West region was not economically feasible in the short term. Specifically, processor representatives testified that operating a floating processor in the West region for this season would not be profitable, due to the length of the golden king crab fishery, the low TAC, the expected price per pound for golden king crab, and the costs associated with operating in that remote location.

On February 18, 2010, NMFS published an emergency action to exempt West-designated IFQ and West-designated IPQ for the WAG fishery from the West regional designation until August 17, 2010 (75 FR 7205). Removing the West regional designation from this IFQ and IPQ temporarily relaxed the requirements that these shares be used in the West region. NMFS extended the emergency action on August 17, 2010 (75 FR 50716), and the exemption is in effect through February 20, 2011.

## **2.4 Analysis of alternatives**

This section analyzes each of the alternatives beginning with the status quo. The first action alternative includes options for defining the qualifying parties to the exemption agreement, as well as two optional procedures. These options are discussed in the analysis of that alternative. To discern the distributional effects, the analysis examines the effects of the alternatives on West region IFQ holders, West region IPQ holders,<sup>17</sup> West region shore-based crab processors, and West region communities.

### **2.4.1 Alternative 1 - The status quo (no exemption)**

Under the status quo, no exemption from the West region landing requirement exists. If PQS holders do not provide processing capacity in the West region (either by development of that capacity or through contracting with existing capacity), landings in that region cannot occur.

From the perspective of holders of West region IFQ, if the holder of matched IPQ fails to make available processing capacity in the West region to receive a delivery, that IFQ holder may be unable to harvest and make delivery of its allocation. In such a circumstance, the IFQ holder's only recourse is to pursue arbitration of the delivery terms. Since arbitration has not been used, to date, for this purpose in any fishery, it is not clear what the outcome of such a process might be. It is clear that an arbitrator cannot compel an IPQ holder to provide processing capacity to accept a delivery (through an injunction or order); however, the arbitrator can establish a contract between the IFQ holder and IPQ holder, defining delivery terms for the IFQ harvests. If an IPQ holder fails to perform, the IFQ holder could pursue a civil action against the IPQ holder for a violation of the contract.

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<sup>17</sup> IFQ and IPQ represent the privilege to harvest and process (respectively) a specific number of pounds of crab in a season. Holders of these shares are directly affected by the regional landing requirements associated with their share holdings. QS and PQS holders are indirectly affected, as the value of their long term share holdings are affected by any change in value of the yielded IFQ and IPQ, respectively.

The terms of any arbitrated delivery are uncertain and would likely depend on the circumstances. Although the arbitration standard directs the arbitrator to establish an ex-vessel price that preserves the historic division of first wholesale revenues, that standard also allows the arbitrator to consider a variety of other factors, including harvesting and processing efficiency and the interest of maintaining financially healthy and stable harvesting and processing. Whether an IPQ holder could effectively use these considerations to convince an arbitrator to adjust a price downward from the historic division of first wholesale revenues is uncertain. IPQ holders currently contend that, in the absence of the Adak plant or a similar multispecies processing facility, no economically feasible processing opportunity exists in the West region. Specifically, these IPQ holders contend that the time between deliveries in the fishery make the introduction of a floating processor or catcher processor infeasible. Whether an arbitrator will find that argument compelling is not known. In addition, IFQ holders have been reluctant to use the arbitration system in the fishery, as they contend that the arbitration system may be disruptive to harvester/processor relationships in the fishery. Whether this reluctance to use the system will continue in the future is not known, but as long as IFQ holders refrain from using this system, it will not be known whether that system could aid in compelling processors to arrange processing capacity in the West region.

IFQ holders (and the vessels that fish those IFQ) who choose not to use the arbitration system for determining delivery terms may be unable to make deliveries in the West region, if the matched IPQ holder fails to arrange for processing in the West region. In recent years, IPQ holder negotiations with the plant operator in Adak are said to have delayed landings of West region allocations. IFQ holders and IPQ holders contend that negotiations with the Adak plant operator are particularly contentious and have caused uncertainty over whether West region harvests will be made in any given year. In the current season, IFQ holders and IPQ holders appear to have determined that the harvesting and processing of the West region allocations are not economically feasible, unless the Adak plant operates. These circumstances suggest that in the absence of the exemption, harvests of West region allocations are in jeopardy of being unharvested, as long as IPQ holders fail to establish their own processing capacity in the West region. Whether IFQ holders' use of the arbitration system could either overcome the reluctance of IPQ holders to establish reliable processing capacity in the region or induce IPQ holders to arrange for processing prior to or early in the season, each year, is not known. In the absence of reliable processing arrangements, harvesters are likely to continue to face uncertainties in arranging deliveries.<sup>18</sup>

Under the status quo, IFQ holders are likely to continue to be frustrated by poor planning of deliveries until reliable processing capacity is made available for their deliveries. It is important to recognize that this depends on several factors. Even if processing capacity is available in the West, if that capacity is not owned or controlled by the PQS holders, IFQ holders may continue to face uncertainties. Disputes between the Adak plant and other IPQ holders delayed landings in the past. Even if IPQ holders have access to the capacity, delivery arrangements will still need to be negotiated. Processors in the fishery have raised concerns that dispersed deliveries drive up their operating costs. Whether operating processors will choose to follow the harvesters preferred delivery schedules (without being compelled to do so by an arbitration determination) is not known.

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<sup>18</sup> It might be asked whether an arbitrator could make a finding that releases the IFQ holder from the IPQ delivery obligation, if an IPQ holder asserts that it is infeasible to receive deliveries in the West region. It is not clear whether such a decision could be made. For such a decision to be administrable, the IPQ holder would need to relinquish the annual IPQ to a receiver, designated by the IFQ holder (to allow for the required use of matched IPQ for a landing). That recipient of the IPQ would need to introduce processing capacity to the West region. The IFQ holder would then need to arrange a delivery to this new IPQ holder in the West region. This option would only be available, if requested by an IFQ holder in the arbitration, which seems unlikely given the IFQ holders' contention that West region processing is infeasible (if the Adak plant is unavailable).

To date, IPQ holders have resisted introducing additional capacity to the West region, choosing instead to rely on the Adak plant to accept their contracted deliveries. While this reliance has complicated deliveries for IFQ holders, IPQ holders have convinced those IFQ holders that West region excessive operational costs prevent alternative arrangements. IFQ holders seem to accept this argument and have chosen not to pursue arbitration to attempt to resolve the issue. Instead, IFQ holders and IPQ holders together have requested regulatory changes that would allow for landings outside of the West region. It is unclear whether an IPQ holder might be compelled to arrange processing capacity (or face a breach of contract claim from an IFQ holder) by an arbitrator or whether an IPQ holder could operate or contract a processing facility profitably. Current IPQ holders contend that any new facility would be unprofitable. Economic feasibility of any shore-based facility would likely depend on whether groundfish landings are available, as the Aleutian Island crab fisheries are relatively small. Whether a floater or catcher processor could be profitably contracted to take deliveries is not known, but may be another potential alternative for arranging deliveries at times when a shore plant is not available. This is likely to differ year-to-year with crab prices, TAC size, and availability of processing vessels. Such an inter-annual uncertainty inevitably increases costs for all parties and may further reduce the economic feasibility of processing in the region.

Overall, IPQ holders are likely to continue to use shore plants in the West region, when those facilities are available and willing to process crab at a reasonable cost under a custom processing arrangement or pay reasonable IPQ lease fees. Currently, the only shore plant likely to operate is the plant in Adak. Its future depends on whether arrangements can be made with Adak Seafood or with another company to operate the facility. The success of reopening the plant will likely depend, in large part, on groundfish availability in the area. In the future, it is possible that a crab processing shore plant could be operated in Atka, but whether such a facility will be operational, sustainable, and economically viable in future is not known.

When shore-based facilities are not available, IPQ holders may choose not to secure processing in the area, in the absence of an offer from an owner of a mobile processing platform or some prompting from an arbitration decision. Current IPQ holders believe that processing in the area, without an operational shore plant, is not cost effective. Consequently, they are unlikely to pursue opportunities to process in the absence of some galvanizing influence. Whether an arbitrator might establish a contract under which an IPQ holder would be obligated to accept deliveries in the West region (or pay damages) is uncertain.

The most likely community beneficiaries of the West region landing requirement are Adak and Atka. Currently, neither community is in a position to benefit. Whether they will realize any benefit in the future will depend on the choices of IFQ holders, IPQ holders, and plant operators. Only Adak appears likely to benefit from West regionalization in the foreseeable future, as it is home to the only operational crab processing facility. Yet, the uncertainties surrounding the operation of the plant in that community bring any potential community benefits into question. If the plant begins to operate and no other processor introduces capacity to the region, it is possible that landings may occur at the Adak plant. If other capacity were introduced (inside or outside a community), the Western Aleutian Island golden king crab processing opportunity in Adak would need to be economically competitive with those other facilities, to attract landings. Given the absence of competition in the past, it cannot be determined whether the plant operators could have offered prices that would be competitive, if other capacity were introduced. In the past, Adak plant operators have asserted that it is difficult or unlikely that the plant can compete with mobile facilities in either the crab or groundfish fisheries. The absence of other facilities in the region is likely a reflection of the difficulty operating in the region. In recent years, mobile groundfish plants have accepted deliveries of Pacific cod. To date, crab processors have perceived no similar opportunity in the crab fishery. The absence of crab processing is likely affected by both IFQ and IPQ in the fishery, which may prevent any owner of a mobile processor from the planning needed to efficiently operate. If a mobile facility were used in the region, it would need to attract landings away from the Adak plant, if that plant

or any other available shore plant in the region is operating. This competition would occur, only if the processor is able to compete profitably, which is not known.

In the long run, it is possible that Atka could benefit from the status quo, West region landing requirement. The owner of the small plant currently operating in Atka holds substantial West region PQS, which would ensure a reliable supply of West region landings, if the plant began accepting crab deliveries. The owner has considered developing crab processing at the plant, but currently has no firm plan for the developing that capacity. The failure of a major PQS holder to develop capacity in the region supports the conclusion that multiple operations capable of processing crab cannot be supported in the region.

#### **2.4.2 Alternative 2 – Contractually defined exemption (the preferred alternative)**

Under the second alternative, an exemption to the regional landing requirement would be permitted on the agreement of specific parties. The alternative requires certain QS holders, PQS holders, communities, and possibly plant operators to be a party to the agreement.

The following options define required parties to the agreement to obtain the exemption (with preferred options and threshold levels underlined):

*To receive an exemption from the regional landing requirement in the WAG fishery,*

*Option 1: specified QS holders, PQS holders, shoreside processors, and municipalities*

*Option 2: specified QS holders, PQS holders, and municipalities (preferred option)*

*shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.*

**Definitions:**

***QS Holders:** Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG QS.*

***PQS Holders:** Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG PQS.*

***Shoreside Processors:** A shoreside processing facility that is located in one of the defined municipalities (Adak or Atka) and that processed in excess [options: 5, 10, or 20] percent of the west-designated WAG IFQ in the preceding fishing year.*

***Municipalities:** The municipalities of Adak and Atka.*

The required QS holders and PQS holders include persons holding in excess of a threshold percentage of the respective West region share pool (i.e., 5 percent, 10 percent, or 20 percent, with 20 percent selected). The Council identified the 20 percent threshold for both QS and PQS for inclusion in its preferred alternative. Currently, 8 persons hold West region QS, while 6 persons hold West region PQS (see Table 9). Of these, only 3 hold shares in excess of the 5 percent and 10 percent thresholds, while only 2 hold in excess of the preferred 20 percent threshold, for each share type. Notably, the Adak plant operator meets only the two lower PQS thresholds (and not the preferred threshold). Under the options defining the exemption, persons below the threshold would have no direct input into whether the exemption could be

accessed. It is not known whether some of these share holders could exert influence on others who control the exemption.

Among harvesters, the most likely influence would be through cooperatives. Since small West region share holders have relatively small undesignated share holdings, it is questionable whether these share holders could exert much influence over the exemption. The one share holder with more than 10 percent, but less than 20 percent, of the West region allocation also holds between 10 percent and 20 percent of the undesignated allocation. It is possible that this share holder may exert some influence over a decision to seek the exemption agreement. Since almost all harvesting has occurred on a few vessels, it is likely that those vessel operators will have substantial input into whether the exemption will be sought. Vessel operators in the fishery have exceeded all West regions thresholds under consideration. Given these considerations, it is likely that small share holders will have little influence over whether an exemption is sought.

In general, QS holders are likely to pursue the exemption, if they perceive a cost to complying with the West region delivery requirement. In general, these QS holders assert that making deliveries in the West region is less costly, as any plant in the West region will be closer to the grounds. Yet, costs could be higher, if a West region plant was not open at opportune times, offloaded too slowly, was not able to reliably schedule deliveries, or could not reliably pay for landings.<sup>19</sup> In the past, harvesters in the fishery have suggested that the Adak plant has suffered from scheduling problems that have driven up their costs. In addition, the harvesters have alleged that the plant has either not paid for or delayed in paying for landings. Factors such as these could lead QS holders to favor the exemption.

Among PQS holders, the most likely influence would be through custom processing arrangements outside the West region. One PQS holder with less than 5 percent of the West shares also has substantial undesignated holdings. It is possible that this PQS holder might influence decisions of the larger West region holders, if it offered particularly good custom processing terms at its plant outside the West. Other large processors outside the West could have a similar influence, despite not holding any West PQS. As with QS holders, operational and cost considerations are likely to affect any decision of whether to pursue an exemption. If PQS holders perceive a higher cost associated with processing in the West region, they are likely to pursue an exemption; however, in the long run, a different dynamic could arise among PQS holders.

If a PQS holder that is a required party to the exemption decides to process in the West, that PQS holder is likely to withhold consent to the exemption. If that PQS holder operates the only plant in the region, it would then likely withhold consent and work to extract as much value as possible from other PQS holders as a part of any negotiation for the processing of their IPQ. The PQS holder most likely to operate in the West is the largest PQS holder, who also is the CDQ representative of Atka, or the plant operator in Adak. While the operation could be beneficial to a community (as is intended by the regional landing requirement), it is possible that a mobile plant could operate outside of any community, thus providing no benefit to any community in the region.

**Table 9. West region share holders exceeding defined thresholds.**

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<sup>19</sup> In the past, the Adak plant leased IPQ from other PQS holders. In all likelihood, the plant was able to lease these IPQ because of its unique position as the only operational plant in the West region.

Share type	Number of holders			
	Total	Over 5 percent	Over 10 percent	Over 20 percent
Quota share	8	3	3	2
Processor quota share	6	3	3	2

Source: NMFS Restricted Access Management Database (2009-2010)

Note: These data are publicly available and non-confidential

The option of requiring any shore plant that processes in excess of a threshold of the prior year's West designated landings could be used to ensure that a shore plant operator in the region can prevent an arrangement among other parties to circumvent the requirement and use other landing options for negotiating leverage. Since typically only a single processor has operated in the West, it is unlikely that the level of the threshold will exclude any facility that operated in the previous year. The shore plant requirement may be over-inclusive in some circumstances, and under-inclusive in others. If a plant operator that has previously operated in the region is uncertain of whether it will operate in a year, it is unlikely to agree to an exemption, in order to maintain its position in the fishery, should it decide to operate. On the other side, a new plant may be planning to enter the fishery (and be fully capable of opening), but have no ability to ensure that landings in the region will be required, as it will have no say in the exemption. While QS holders maintain that a plant in the West would have operational benefits for vessels harvesting in the fishery, it is unlikely that a West region plant can operate as efficiently as plants outside of the West region. Whether QS holders would deny the exemption in support of such a new plant is uncertain and could depend on whether PQS holders are willing to share any efficiency benefits realized as a result of the exemption. So, assuming that the purpose of including shore plant owners in the exemption is to ensure that the exemption is not available, if a West region facility is operational, it is not clear that the exemption will not be available, even if a new plant opens in the region.

Making the communities of Adak and Atka required parties to the contract could aid any development of shore plant capacity in those communities by allowing the communities to intervene on their behalf. The provision would require local governments to consent to the exemption. A few complications could arise by requiring local governments to be a party to the agreement. Since government administrators may not have authority to consent to an exemption without approval of the representative governmental body, it is likely that the representative body will need to meet and actively consent to the exemption. Such a public process could be time consuming. Although the crab season is several months long, whether any delay on the part of a community to approve the exemption will lead to the exemption being ineffective, is not known. In addition, community officials who believe that development of processing capacity is important to the region may be unwilling to consent to the exemption. Under these circumstances, the *de facto* veto power conveyed to each required participant under the Council's proposal may make an exemption much less likely.

In most cases, it can be anticipated that these representatives will act on behalf of localized interests, withholding consent to an exemption to foster local objectives. Yet, in some circumstances, it is possible that political considerations or competing interests could lead some community representatives to consent to an exemption, against the interests of a local plant. For example, if IFQ and IPQ holders were to offer to compensate a community for lost tax revenues arising from the exemption, it is possible that a community government would consent to the exemption, despite the ability of a local processor to handle crab landings. Depending on the political climate in a community, it is also possible that a community could consent to an exemption, despite the interests of the local business.

While inclusion of community representatives as required parties may not always protect community-based plants, community participation in the agreement could be critical to ensuring that some regional benefit arises from West regionalization. Without requiring community agreement, it is likely that harvesters and processors would agree to the exemption, based solely on their expected short-run economic returns from the fishery. Most processors assert that costs are substantially higher in the West region (as scale efficiencies are available in locations with better access to other crab fisheries and larger groundfish fisheries). Given these costs and the apparent agreement of harvesters with this processor concern, it is possible that the exemption would be routinely agreed to, if community consent were not required.

The exemption is generally established by an annual agreement of the required parties. Once those parties file an affidavit with NMFS affirming the existence of such a contract, the exemption would be granted. The following provision would be used to define when the exemption is available:

*Approval of Exemption:*

*An exemption to the regional landing requirement will be granted if the contracting parties have filed an affidavit with NMFS, affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.*

Under the provision, the exemption is granted only if the required parties agree to the exemption. Between harvesters and processors, it is possible that one party could use its required consent for negotiating leverage. For example, a harvester, knowing that processing costs are higher in the West region, may withhold consent unless a processor is willing to share some of its efficiency benefits. While such a position may not be objectionable, especially if the harvester is likely to incur additional delivery costs, the ability to withhold consent may alter negotiating positions of the two parties. Similarly, communities could withhold consent to induce PQS holders to develop processing capacity in the region. While some PQS holders may view this position as unfair, it is likely consistent with the intent of the regional landing requirement.

While this provision can be administered in a straightforward manner, the option provides no certainty to participants in the fishery. Since no deadline for filing the exemption is provided, it is assumed that the exemption would be available at any time, if the parties filed the agreement. This degree of flexibility may be beneficial in that it would allow parties to wait to determine if processing capacity could be made available in the region prior to establishing the exemption. Yet, that same flexibility may provide some fishery participants with little certainty, if a required party desires to withhold consent in hopes that the exemption may not be needed. For example, a community may withhold consent until it is fully satisfied that PQS holders have shown considerable evidence that processing in the region is not feasible. Even then, there is no assurance that the agreement would be forthcoming. Because of these uncertainties, it is unclear whether the exemption could effectively address concerns of fishery participants. These uncertainties may drive up costs, dissipating rents from the fishery.

Overall, the effect of this provision will depend on the parties' choices. Each required party to the contract is free to determine whether to accede to the exemption. The exemption will be agreed to, when all parties see it in their interest to go along with the exemption. Whether a party may try to extract some additional benefit from the other parties is fully within its discretion. While the option is effective in making sure that each required party has veto power over the exemption, the manner in which that veto power will be exercised is not certain. To the extent that there is turnover in required parties (either through transfers of QS or PQS or changes in community representation), the motivation of those parties

may change, along with the results of the exemption. Consequently, whether the exemption serves its intended purpose is uncertain and may vary over time.

## **2.5 Net benefits to the Nation**

This action should bring a small increase in net benefits to the Nation by providing an additional opportunity for landings of crab from the Western Aleutian Island golden king crab fishery, in the event that parties are unable to reasonably access processing in the West region of the fishery. Although requiring the communities of Adak and Atka to agree to any exemption could prevent the exemption from being granted (effectively compelling fishery participants to either develop or contract processing capacity in the region to comply with the regional landing requirement), any time the exemption is granted, it is likely that some net benefits will be realized by fishery participants who are only likely to use the exemption when production efficiencies can be improved by redirecting processing outside of the region. The magnitude of the gain in net benefits is likely to be fairly small, as the total gross revenues derived from production in the West region of the fishery is typically less than \$5 million. Despite this relatively small potential gain in net benefits, the efficiencies are said to be important by participants in the fisheries.

## **3 FINAL REGULATORY FLEXIBILITY ANALYSIS (FRFA)**

### **3.1 Introduction**

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

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 rule, including an estimate of the classes of small entities which 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 the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

In determining the scope, or ‘universe’, of the entities to be considered in a FRFA, the National Marine Fisheries Service (NMFS) generally includes only those entities that can reasonably be expected to be directly regulated by the 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.

Data on cost structure, affiliation, and operational procedures and strategies in the fishing sectors subject to the regulatory action are insufficient, at present, to permit preparation of a “factual basis” upon which to certify that the regulatory action does not have the potential to result in significant adverse economic impacts on a substantial number of small entities (as those terms are defined under RFA). Because, based on all available information, it is not possible to ‘certify’ this outcome, should the proposed action be adopted, a formal FRFA has been prepared and is included in this package for Secretarial review.

### **3.2 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 a “small business concern,” which is defined under Section 3 of the Small Business Act. A “small business” or “small business concern” includes any firm that is independently owned and operated and not dominate in its field of operation. The U.S. Small Business Administration (SBA) has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative, except that where the form is a joint

venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business “involved in fish harvesting” is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates), and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates) and employs 500 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

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

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

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners control the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint ventures if the ostensible

subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

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

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

### **3.3 Need for, and Objectives of, the Rule**

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

*The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude. A reliable shoreside processing facility may not be available each season to take delivery and process WAG IFQ. Relaxing the regional landing requirement would allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.*

### **3.4 Public Comments on Initial Regulatory Flexibility Analysis**

The proposed rule for this action was published in the Federal Register on February 15, 2011 (76 FR 8700). An Initial Regulatory Flexibility Analysis (IRFA) was prepared for the proposed rule and described in the classification section of the preamble to the proposed rule. The public comment period ended on April 1, 2011.

NMFS received three unique comment letters; however, no comments were received on the IRFA. No changes were made in the final rule from the proposed rule.

### **3.5 Number and Description of Affected Small Entities**

The preferred alternative directly regulates certain QS holders, IFQ holders, PQS holders, IPQ holders, the communities of Adak and Atka, and possibly certain shore-based processors in those two communities. The fishery has 16 QS holders, of which 14 are estimated to be small entities. One of these entities is a community development quota (CDQ) group; one is a wholly owned subsidiary of a CDQ group; and the others do not exceed the \$4.0 million threshold. In the 2009/2010 season, the fishery had three holders of West region IFQ, two of which are estimated to be small entities. One of these is a wholly owned subsidiary of a CDQ group, and the other is estimated to have annual receipts below the \$4.0 million threshold.

The fishery had six holders of West region PQS, of which four are estimated to be small entities. One entity is a CDQ group; another is a wholly owned subsidiary of a CDQ group, and two have fewer than 500 employees. In the 2009/2010 season, the fishery had six holders of West region

IPQ, three of which are estimated to be small entities. One entity is a CDQ group; another is a wholly owned subsidiary of a CDQ group, and the third has fewer than 500 employees.

Both the communities of Adak and Atka qualify as small entities, as neither has more than 50,000 residents.

### **3.6 Recordkeeping and Reporting**

The reporting, recordkeeping, and other compliance requirements could be increased under the proposed action, if parties agree to pursue an exemption. This proposed rule would add recordkeeping and reporting requirements needed to implement the preferred alternative, including those related to the application to NMFS for an exemption from the West regional delivery requirements proposed at § 680.4(o).

The recordkeeping, reporting, and compliance requirements necessary to implement the preferred alternative would apply to the QS holders, PQS holders, and the municipalities meeting the requirements for eligible signatories, proposed at § 680.4(o).

Participation in any application to exempt IFQ and IPQ from the West regional delivery requirements is voluntary, but may be necessary to fully utilize the TAC in seasons when in-region processing facilities cannot meet the capacity requirements of the fishery. Each designated signatory to the application must participate together with all other designated signatories to meet the requirements of the application process proposed at § 680.4(o). To request an annual exemption, all designated signatories must contractually agree to submit to NMFS one completed application form. NMFS will accept applications with multiple signature pages provided that a completed application is submitted by all contract signatories. The proposed recordkeeping and reporting requirements are expected to be minimal because all eligible signatories must work together to apply, thereby sharing the cost of developing and submitting an application. The time and cost involved in developing and submitting an application would be less per eligible signatory than it would be if each signatory developed an application individually.

The professional skills necessary to prepare the reporting and recordkeeping requirements that would apply to small entities under this proposed rule include the ability to read, write, and understand English; the ability to use a computer and the Internet; and the authority to take actions on behalf of the designated signatory. Each of the small entities must be capable of complying with the requirements of this proposed rule and have the financial resources to contract for any additional legal or technical expertise that they require to advise them.

The burden of drawing up and submitting to NMFS the actual affidavit would be expected to be *de minimus*.

### **3.7 Description of Significant Alternatives to the Rule**

In addition to the preferred alternative, the Council considered alternatives that would have required the consent of holders of less than 20 percent of the pools of QS and PQS and the consent of shore-based processors in Adak or Atka that processed over a threshold (i.e., 5 percent, 10 percent, or 20 percent) of the West-designated shares in the year preceding the exemption. The Council elected not to select these options, as the large share holders could more efficiently process the exemption, and the small share holders would be adequately represented

by the required parties to the exemption (including the Cities of Adak and Atka). The inclusion of shareholders with less economic incentive to harvest or process West-designated WAG could impede effective negotiations by withholding participation in an exemption to extract more favorable terms from larger entities with greater economic incentive to fully harvest and process the IFQ and IPQ. IFQ and IPQ holders that are substantially invested in the fishery are more likely to act quickly to ensure that TAC is fully utilized. Similarly, holders of significant amounts of PQS are only likely to support an exemption in years when processing capacity is unavailable in the West region, thereby facilitating the processing needs of all IPQ holders.

The Council also considered a variety of other approaches to address the problem identified in the purpose and need statement. One approach considered was an exemption that would be available only after a factual finding of the absence of processing capacity. This provision could be administered either directly by NMFS or by an arbitrator selected by the interested parties. The Council elected not to advance this alternative, as factual findings of the absence of processing capacity may be administratively unworkable. With mobile processing platforms, capacity availability can change in a relatively short time period. Determinations of the availability of capacity may not be possible, given the potential for short term changes in capacity. Small entities that are IFQ or IPQ holders would be disadvantaged by this alternative, since the exemption may be unavailable in circumstances that it might be appropriate.

The Council also considered a provision under the preferred alternative that would have prohibited any party required to consent to the exemption from unreasonably withholding consent to the exemption. The proposed provision would have been administered by an arbitrator jointly selected by the required parties. Although such a provision might be desirable, as it would prevent persons from barring the exemption without reason, the provision would also likely be unadministerable. Even with an arbitrator, NMFS would be required to provide the interested parties with the opportunity to appeal any arbitrator decision. Under the appeal, NMFS would be required to make a *de novo* finding (i.e., an original finding without deference to the arbitrator's decision). As a result, the use of an arbitrator may delay the granting of the exemption. In addition, NMFS may be unable to expeditiously process any claim, if factual matters are disputed. To accommodate time constraints associated with contesting a party's withholding consent to an exemption, a timeline for application for the exemption would need to be developed. This timeline would limit flexibility and could prevent the exemption from achieving its intended purpose. Although IFQ holders and IPQ holders that are small entities may benefit from the exemption in some circumstances, it might be denied because of another party's unreasonable decision to withhold consent. Since the provision is generally unworkable, it is unlikely that this alternative would have provided any benefit to these small entities. In addition, the provision might lead small entities to pursue administrative proceedings to challenge another required party's withholding of consent, which could be costly to small entities.

The Council also elected not to advance an alternative to remove the West regional delivery requirements altogether. Since the West regional delivery requirements are intended to induce the development of processing in the region, when such development is feasible, removal of the exemption would be inappropriate. Although this alternative would have removed the burden of the West regional delivery requirements from small entities holding QS, PQS, IFQ, and IPQ, the

alternative would have removed any regulatory inducement to process in the West region. The potential future benefit of those requirements would therefore be denied to the communities of Adak and Atka. Although the exemption created by the preferred alternative could reduce the potential for the development of processing capacity in Adak and Atka, it would provide these two small entities with the ability to withhold consent, as a means of inducing PQS and IPQ holders to develop processing capacity in the West region.

Compared with the status quo, the preferred alternative, and the associated suite of options comprising the preferred alternative, best minimizes adverse economic impacts on the directly regulated small entities. The action provides greater economic benefits for participants in the WAG fishery by providing additional processing opportunities when processing capacity is not available in the West region. The Council chose to recommend the preferred alternative because this action best meets the goals of this action. As proposed this action minimizes the potential negative impacts to small entities directly, such as unharvested TAC, when compared to the other options, while promoting stability in a region that has traditionally benefited from the regional delivery requirements.

## **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 designed to prevent overfishing. Either of the action alternatives would be intended to aid participants in harvest of the TAC and achieving optimum yield.

#### **National Standard 2**

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

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

#### **National Standard 3**

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

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

#### **National Standard 4**

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

The proposed alternatives would treat all participants the same, regardless of their state of residence. The proposed change would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program. The alternatives make no change in the distribution of fishing or processing privileges among holders. The action will not contribute to an entity acquiring an excessive share of privileges.

### **National Standard 5**

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

This action considers efficiency in utilization of the resource balancing that efficiency against regional interests represented by the regional landing requirement. The action is motivated by the potential failure to provide the opportunity to fully harvest the TAC, as a result of the current and potential future lack of processing capacity in the West region.

### **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 Island 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 does not duplicate any other measure and could reduce costs of enforcement actions in the fisheries, to the extent that West region landing requirements may not be complied with.

### **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 action creates an exemption to West region landing requirements that could deprive the communities of Adak and Atka landings from the Western Aleutian Island crab fishery; however, those communities have the authority to withhold consent to the exemption to induce PQS and IPQ holders to develop processing capacity in the West region (which includes both communities).

### **National Standard 9**

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

This action has no effect on bycatch or discard mortality.

### **National Standard 10**

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

The alternatives considered under this action have no direct affect on safety of human life at sea.

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

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

## **5 REFERENCES**

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

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Sackton, John. 2009. "Golden King Crab Price Formula Arbitrator and Market Report", June 26, 2009.

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