

**Amendment 18**  
**Fishery Management Plan for**  
**Bering Sea/Aleutian Islands King and Tanner Crabs**

**(1) Add the following as Chapter 11.0 Voluntary Three-Pie Cooperative Program:**

*The following incorporates the preferred Bering Sea Crab Rationalization Program Alternatives – established at the Council's June 2002, October 2002, December 2003, January/February 2003, and April 2003 meetings. Unless otherwise noted, the provisions were adopted at the June 2003 meeting. This motion advances a VOLUNTARY THREE PIE COOPERATIVE, designed to recognize the prior economic interests and importance of the partnership between harvesters, processors and communities.*

**BSAI Crab Rationalization Problem Statement**

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

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

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

**Elements of the Crab Rationalization Program**

**Harvesting Sector Elements**

Harvester shares shall be considered a privilege and not a property right.

**1.1 Crab fisheries included in the program are the following fisheries subject to the Federal FMP for BSAI crab:**

Bristol Bay red king crab  
Brown king (Al Golden king) crab  
Adak (WA) red king crab – West of 179° W  
Pribilof Islands blue and red king crab  
St. Matthew blue king crab  
Opilio (EBS snow) crab  
Bairdi (EBS Tanner) crab

3. Exclude the EAI Tanner, WAI Tanner, Dutch Harbor (EAI) red king crab, and Adak (WAI) red king crab east of 179° West longitude.
- 1.2 Persons eligible to receive an initial allocation of QS must be:
  - Option 1. Any person that holds a valid, permanent, fully transferable LLP license.
- 1.3 Categories of QS/IFQs
  - 1.3.1 Crab Fishery Categories - QS/IFQs will be assigned to each of the crab fisheries included in the program as identified in paragraph 1.1 except Dutch Harbor red king, EAI Tanner, and WAI Tanner and WAI red king crab east of 179° West longitude.
    - 1.3.1.1 Brown king crab (AI golden king crab) option.
      - Option 1. Split into two categories: Dutch Harbor (EAI) brown king crab (east of 174° W long.) and Western Aleutian Islands brown king crab (west of 174° W long.).
  - 1.3.2 Harvesting sector categories - QS/IFQs will be assigned to one of the following harvesting sector categories:
    - a. catcher vessel (CV), or
    - b. catcher/processor (CP)

QS-IFQ for the Catcher/Processor sector is calculated from the crab that were both harvested and processed onboard the vessel. This shall confer the right to harvest and process crab aboard a catcher processor in accordance with section 1.7.2.
  - 1.3.3 Processor delivery categories - QS/IFQs for the CV sector shall be assigned to the following two processor delivery categories (the percentage split between class A/B shares is defined under the Processing Sector Elements, 2.4):
    - (a) Class A – allow deliveries only to processors with unused PQs
    - (b) Class B – allow deliveries to any processor, except catcher processors
  - 1.3.4 Regional Categories - QS/IFQs for the CV sector is assigned to regional categories. The two regions are defined as follows (see Regionalization Elements for a more detailed description of the regions):
 

North Region - All areas on the Bering Sea north of 56° 20' N. Latitude.

South Region - All areas not included in the North Region.
- 1.4 Initial allocation of QS
  - 1.4.1. Calculation of initial QS distribution will be based on legal landings excluding deadloss.
    - (a) Calculation of QS distribution. The calculation is to be done, on a vessel-by-vessel basis, as a percent of the total catch, year-by-year during the qualifying period. Then the sum of the yearly percentages, on a fishery-by-fishery basis, is to be divided by the number of qualifying years included in the qualifying period on a fishery-by-fishery basis to derive a vessel's QS.

For each of the fisheries for which such a vessel holds valid endorsement for any years between the sinking of the vessel and the entry of the Amendment 10 replacement vessel to the fishery and was active as of June 10, 2002, allocate QS according to 50% of the vessel's average history for the qualifying years unaffected by the sinking.

Additional Sunken Vessel Provision (from December 2002 motion)

The following provision would apply to persons whose eligibility to replace their vessel was initially denied under PL 106-554. The sunken vessel must have been replaced with a newly constructed vessel and have been under construction by June 10, 2002, and participated in a Bering Sea crab fishery by October 31, 2002 for a person to receive a benefit under this provision.

For each of the fisheries for which such a vessel holds a valid endorsement, for all seasons between the sinking of the vessel and the entry of the replacement vessel to the fishery within the IRS replacement period (as extended by the IRS, if applicable) allocate QS according to 50 percent of the vessel's average history for the qualifying years unaffected by the sinking. Construction means the keel has been laid.

(b) Basis for QS distribution.

Option 1. For eligibility criteria in paragraph 1.2, the distribution of QS to the LLP license holder shall be based on the catch history of the vessel on which the LLP license is based and shall be on a fishery-by-fishery basis. The underlying principle of this program is one history per vessel.

(Option 1) Persons who have purchased an LLP, with GQP, EQP and RPP qualifications to remain in a fishery may obtain a distribution of QS on the history of either the vessel on which the LLP is based or on which the LLP is used, NOT both. License transfers for purposes of combining LLPs must have occurred by January 1, 2002.

(Old Option 3) In cases where the fishing privileges (i.e. moratorium qualification or LLP license) of an LLP qualifying (i.e. GQP, EQP, RPP and Amendment 10 combination) vessel have been transferred, the distribution of QS to the LLP shall be based on the aggregate catch histories of (1) the vessel on which LLP license was based up to the date of transfer, and (2) the vessel owned or controlled by the LLP license holder and identified by the license holder as having been operated under the fishing privileges of the LLP qualifying vessel after the date of transfer. Only one catch history per LLP license. The only catch histories that may be credited by transfer under this suboption are the individual catch histories of vessels that generate a valid permanent fully transferable LLP license.

1.4.2. Qualifying Periods for Determination of the QS Distribution:

1.4.2.1 Opilio (EBS snow crab)

- Option 4. 1996 - 2000 (5 seasons)  
a. Best 4 seasons

1.4.2.2 Bristol Bay red king crab

- Option 3. 1996 - 2000 (5 seasons)  
a. Best 4 seasons

1.4.2.3 Bairdi (EBS Tanner crab)

- Option 2. 91/92 - 1996 (best 4 of 6 seasons)

1.4.2.4 and 1.4.2.5 Pribilof red and blue king crab

- Option 2. 1994 - 1998  
b. Drop one season

1.4.2.6 St. Matthew blue king crab

- Option 2. 1994 - 1998  
b. Drop one season

1.4.2.7 Brown king crab (based on biological seasons)  
(Options apply to both Dutch Harbor (EAI) and Adak western Aleutian Island brown king crab)

Option 4. 96/97 2000/01 (all 5 seasons)

Suboption: Award each initial recipient QS based on:  
b. historical participation in each region.

1.4.2.8 Adak (WAI) red king crab - west of 179° west long.

Option 1. 1992/1993 – 1995/1996 (4 seasons)  
d. Best 3 seasons

#### 1.5 Annual allocation of IFQs:

1.5.1 Basis for calculating IFQs:

Option 2. Convert GHL to a TAC and use the TAC as the basis.

#### 1.6 Transferability and Restrictions on Ownership of QS/IFQs:

1.6.1 Persons eligible to receive QS/IFQs by transfer:

Option 2. US citizens who have had at least:  
(b). 150 days of sea time

Option 3. Entities that have a U. S. citizen with 20% or more ownership and at least:  
(b). 150 days of sea time

Suboption: Initial recipients of harvesting quota share grandfathered  
\*Definition of sea time

Option 1. Sea time in any of the U.S. commercial fisheries in a harvesting capacity.

Option 4. Allow a CDQ organization to be exempted from the restriction for the 150 days of sea time requirement under 1.6 Transferability and Restrictions on Ownership of QS/IFQs.

1.6.2 Leasing of QS (leasing is equivalent to the sale of IFQs without the accompanying QS.)  
Leasing is defined as the use of IFQ on vessel which QS owner holds less than 10% ownership of vessel or on a vessel on which the owner of the underlying QS is present:

Option 1. Leasing QS is allowed with no restrictions during the first five years after program implementation.

1.6.3 Separate and distinct QS Ownership Caps - apply to all harvesting QS categories pertaining to a given crab fishery with the following provisions:

- Initial issues that exceed the ownership cap are grandfathered at their current level as of June 10, 2002; including transfers by contract entered into as of that date.
- Apply individually and collectively to all QS holders in each crab fishery;
- Percentage-cap options for the Bristol Bay red king crab, Opilio, Bairdi, Pribilof red and blue king crab and St. Matthew blue king crab fisheries (a different percentage cap may be chosen for each fishery):

Option 4. 1.0% of the total QS pool for Bristol Bay red king crab.

Option 5.	1.0% of the total QS pool for Opilio crab.
Option 6.	1.0% of the total QS pool for Bairdi crab.
Option 7.	2.0% of the total QS pool for Pribilof red and blue king crab.
Option 8	2.0% of the total QS pool for St. Matthew blue king crab.

- d. A percentage-cap of 10% is adopted for the Dutch Harbor (EAI) brown king crab, and a 10% cap for western Aleutian Island (Adak) brown king crab.
- e. A percentage-cap of 10% is adopted for WAI (Adak) red king crab west of 179° West longitude.

#### **Harvest Share Ownership Caps for CDQ Groups (from the February 2003)**

The following ownership caps shall apply to CDQ ownership of crab QS

Bristol Bay red king crab	5%
Bering Sea opilio crab	5%
Bering Sea bairdi crab	5%
Pribilof red and blue king crab	10%
St. Matthew blue king crab	10%
EAI brown king crab	20%
WAI red king crab	20%
WAI brown king crab	20%

In addition, the Council shall apply the individual and collective rule for calculation of the CDQ ownership caps, under which the holder of an interest in an entity will be credited with holdings in proportion to its interest in the entity.

#### **1.6.4 Controls on vertical integration (ownership of harvester QS by processors):**

Option 2: A cap of 5% with grandfathering of initial allocations as of June 10, 2002, including transfers by contract entered into as of that date.

Option 3: Vertical integration ownership caps on processors shall be implemented using both the individual and collective rule using 10% minimum ownership standards for inclusion in calculating the cap. PQS ownership caps are at the company level.

#### **Processor Holdings of Harvest Shares (A/B Share Issue) (from the April 2003 motion)**

Crab harvester QS held by IPQ processors and persons affiliated with IPQ processors will only generate class A annual IFQ, so long as such QS is held by the IPQ processor or processor affiliate.

IPQ processors and affiliates will receive class A IFQ at the full poundage appropriate to their harvesters QS percentage.

Independent (non-affiliated) harvesters will receive class B IFQ pro rata, such that the full class B QS percentage is allocated to them in the aggregate.

"Affiliation" will be determined based on an annual affidavit submitted by each QS holder. A person will be considered affiliated, if an IPQ processor controls delivery of a QS holder's IFQ.

1.7.2.1.1 Catcher/Processors shall be granted CP-QS in the same manner as catcher vessels.

**1.7.2.3 Allowance for Catcher/Processors:**

Option 2. Catcher/Processors are allowed to purchase additional PQS from shore based processors as well as PQS from other Catcher/Processors as long as the crab is processed within 3 miles of shore in the designated region.

Option 4. Catcher/Processors may sell unprocessed crab to any processor

Option 5. Only catcher processors that both caught and processed crab onboard their qualifying vessels in any BSAI crab fishery during 1998 or 1999 will be eligible for any CP QS in any IFQ or Coop program.

Option 6. CP-QS initially issued to a catcher/processor shall not be regionally or community designated.

Option 8. The CP sector is capped at the aggregate level of initial sector-wide allocation.

**1.7.2.4 Transfers to shore-based processors:**

c. Catcher/Processors shall be allowed to sell CP/QS as separate Catcher Vessel QS and PQS. The shares shall be regionally designated when sold (both shares to same region).

**Other Harvester Options**

1.7.3 Catch accounting under IFQs - All landings including deadloss will be counted against IFQs. Options for treatment of incidental catch are as follows:

Option 4. Discards of incidentally caught crab will be allowed

Option 5. Request ADF&G & BOF & BOF/NPFMC Joint Protocol Committee to address concerns of discard, highgrading, incidental catch and need for bycatch reduction and improved retention in season with monitoring to coincide with implementation of a crab rationalization program.

1.7.4 Use caps on IFQs harvested on any given vessel are provided for those vessels not participating in a voluntary cooperative described under section 6.1.:

**Option 1.**

c. Two times the ownership cap:

- 2.0% for BS Opilio crab
- 2.0% BB red king crab
- 2.0% BS bairdi crab
- 4.0% for Pribilof red and blue king crab
- 4.0% for St. Mathew blue king crab
- 20% for EAI (Dutch Harbor) brown king crab
- 20% for Adak (WAI) brown king crab
- 20% for Adak (WAI) red king crab west of 179° West longitude

1.8.1 Options for captain and crews members (from December 2002 motion):

**1.8.1.2 Percentage to Captain:**

1. Initial allocation of 3% shall be awarded to qualified captains as C shares.

a. Allocation from QS pool

1.8.1.3 Species specific:

1. As with vessels.

1.8.1.4 Eligibility:

Option 1

1. A qualified captain is determined on a fishery by fishery basis by

- 1) having at least one landing in 3 of the qualifying years used by the vessels and
- 2) having recent participation in the fishery as defined by at least one landing per season in the fishery in two of the last three seasons prior to June 10, 2002.

Suboption: For recency in the Adak red king, Pribilof, St. Matthew, and bairdi fisheries a qualified captain must have at least one landing per season in the opilio, BBRKC, or AI brown crab fisheries in two of the last three seasons prior to June 10, 2002 (operators of vessels under 60 feet are exempt from this requirement for the Pribilof red and blue king crab fishery).

2. A captain is defined as the individual named on the Commercial Fishery Entry Permit.

For captains who died from fishing related incidents, recency requirements shall be waived and the allocation shall be made to the estate of that captain. All ownership, use, and transfer requirements would apply to C shares awarded to the estate.

1.8.1.5 Qualification period:

1. As with vessels.

1.8.1.6 Distribution per captain:

1. C QS based on landings (personal catch history based on ADF&G fish tickets) using harvest share calculation rule.

Regionalization and Class A/B Designation

- Option 2: C shares shall be a separate class of shares not subject to the Class A share delivery requirements during the first three years. But, at the end of three years, C shares shall be subject to A/B designations with regionalization unless the Council determines (after review) not to impose these designation.

Initial Allocation Regionalization

If C shares are regionalized, at the initial allocation regional designations shall be made based on the captain's history, with an adjustment to the allocation to match the PQS regional ratio made based on the same scheme used for regional adjustment of harvest shares.

1.8.1.7 Transferability criteria:

1. Purchase of C QS.
  - a. C QS may be purchased only by persons who are
    - Option 1. US citizens who have had at least 150 days of sea time in any of the US commercial fisheries in a harvesting capacity and
    - Option 2. active participants

An "active participant" is defined by participation as captain or crew in at least one delivery in a crab fishery included in the rationalization program in the last 365 days as evidenced by ADF&G fish ticket, affidavit from the vessel owner, or evidence from other verifiable sources.

2. C share leasing

- a. C QS are leaseable for the first three seasons a fishery is prosecuted after program implementation.
- b. In cases of hardship (injury, medical incapacity, loss of vessel, etc.) a holder of C shares may lease C QS, upon documentation and approval, (similar to CFEC medical transfers) for the term of the hardship/disability for a maximum of 2 years over a 10 year period.

1.8.1.8 Loan program for crab QS

A low-interest rate loan program consistent with MSA provisions, for skipper and crew purchases of QS, shall be established for QS purchases by captains and crew members using 25% of the Crab IFQ fee program funds collected. These funds can be used to purchase A, B, or C shares.

Loan funds shall be accessible by active participants only.

Any A or B shares purchased under the loan program shall be subject to any use and leasing restrictions applicable to C shares (during the period of the loan).

National Marine Fisheries Service (NOAA Fisheries) is directed to explore options for obtaining seed money for the program in the amount of \$250,000 to be available at commencement of the program to leverage additional loan funds.

1.8.1.9 Captain/Crew on Board requirements

- 1) Holders of captain QS or qualified lease recipients are required to be onboard vessel when harvesting IFQ.
- 2) C QS ownership caps for each species are  
Option 2. the same as the vessel use caps for each species

C share ownership caps are calculated based on the C QS pool (i.e. section 1.7.4). Initial allocations shall be grandfathered.

- 3) Use caps on IFQs harvested on any given vessel shall not include C shares in the calculation.

1.8.1.10 C/P Captains

Captains with C/P history shall receive C/P C QS at initial issuance. C/P C shares shall carry a harvest and processing privilege.

- Option 3. C/P C shares may be harvested and processed on C/Ps or harvested on catcher vessels and delivered to shore based processors.

1.8.1.11 Cooperatives

C share holders shall be eligible to join cooperatives.

C shares shall be included in the IFQ fee program.



1.8.2 Overage Provisions for the Harvesting Sector:  
Allowances for overages during last trip:

Option 2. Overages up to 3% will be forfeited. Overages above 3% results in a violation and forfeiture of all overage.

1.8.3 AFA Vessel Option. Eliminate harvester sideboard caps.

1.8.5 Sideboards (from December 2002 motion).

Option 1 (a): Non-AFA vessels that qualify for QS in the rationalized opilio crab fisheries would be limited to their GOA groundfish catch history excluding sablefish. The sideboards would be based on the history of vessels subject to the caps, applied in aggregate, on an area specific basis, and apply jointly to both the vessel and the license.

<u>Combine options 2 and 3:</u>	Vessels with less than 100,000lbs total opilio history during the qualifying years and more than 500MT of total cod history during the qualifying years would be exempt from the sideboard cap.
<u>Option 4:</u>	Vessels with less than 50MT total groundfish landings in the qualifying period would be prohibited from participating in the GOA cod fishery.

Require that crab co-ops limit their members to their aggregate cod catch in both federal and state waters to the sideboarded amount (provided such a limitation is within the Council's authority). Staff is requested to examine how this integrates with the existing coop structure in the preferred alternative and identification of enforcement options available to the coop which will ensure compliance with parallel fishery limitations.

Sideboards will expire on rationalization of the Gulf of Alaska.

## 2. Processing Sector Elements

Processor shares shall be considered a privilege and not a property right.

2.1 Eligible Processors - processors (including catcher-processors) eligible to receive an initial allocation of processing quota shares (PQs) are defined as follows:

- (a.) U.S. corporation or partnership (not individual facilities) that processed crab during 1998 or 1999, for any crab fishery included in the IFQ program.

Hardship provisions for processors that did not process crab in 1998 or 1999 but meet the following provisions:

- A processor (not Catcher/Processor) that processed opilio crab in each season between 1988 and 1997 and
- Invested significant capital in the processing platform after 1995, will be determined to be a qualified processor.
- Significant capital is defined as a direct investment in processing equipment and processing vessel improvements in excess of \$1 million.

## 2.2 Categories of Processing Quota Shares

2.2.1 Crab fishery categories - processing quota shares shall be issued for the same crab species identified in Section 1.1

2.2.2 Regional categories - processing quota shares will be categorized into two regions (see Regionalization Elements for description of regions):

Northern Region - All areas on the Bering Sea north of 56° 20' N. latitude

Southern Region - All areas not in the Northern region

## 2.3 Initial allocation of processing quota shares

Option 1. Processing quota shares shall be initially issued to Eligible Processors based on three-year average processing history<sup>1</sup> for each fishery, determined by the buyer of record listed on ADF&G fish tickets, as follows:

- (a) 1997 - 1999 for Bristol Bay red king crab
- (b) 1996 - 1998 for Pribilof red and blue king crab,
- (c) 1996 - 1998 for St. Matthew blue crab
- (d) 1997 - 1999 for opilio crab
- (e) EBS Bairdi crab based on 50/50 combination of processing history for BBRKC and opilio
- (f) 1996/97 - 1999/00 seasons for brown king crab
- (g) The qualifying years for issuance of IPQ in the Adak (WAI) red king crab fishery west of 179° West longitude will be:

Option B. Based on Western Aleutian Islands brown king crab IPQ

Option 4. If the buyer can be determined, by NMFS using the State of Alaska Commercial Operators Annual Report, fish tax records, or evidence of direct payment to fishermen, to be an entity other than the entity on the fish ticket, then the IPQ shall be issued to that buyer.

## 2.4 Percentage of season's GHL or TAC for which IPQs are distributed:

2.4.1 IPQs will be issued for a portion of the season's GHL or TAC for each species to provide open delivery processing as a means to enhance price competition:

Option 3. 90% of GHL (or TAC) would be issued as IPQs - the remaining 10% would be considered open delivery.

## 2.5 Implementation of the open delivery-processing portion of the fishery:

Catcher vessel QS/IPQs are categorized into Class A and Class B shares. Purchases of crab caught with Class A shares would count against IPQs while purchases of crab caught with Class B shares would not. Crab caught with Class B shares may be purchased by any processor on an open delivery basis.

- 2.6 Transferability of processing shares - provisions for transferability include the following:
- a. Processing quota shares and IPQs would be freely transferable, including leasing
  - b. IPQs may be used by any facility of the eligible processor (without transferring or leasing)
  - c. Processing quota shares and IPQs categorized for one region cannot be transferred to a processor for use in a different region.
  - d. New processors may enter the fishery by purchasing IPQ or by purchasing Class B Share crab or by processing CDQ crab.

## 2.7 Ownership and use caps -

### 2.7.1 Ownership caps

Option 4. No ownership to exceed 30% of the total PQS pool on a fishery by fishery basis with initial issues grandfathered.

PQS ownership caps should be applied using the individual and collective rule using 10% minimum ownership standards for inclusion in calculating the cap. PQS ownership caps are at the company level.

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<sup>1</sup>The three-year average shall be the three-year aggregate pounds purchased by each Eligible Processor in a fishery divided by the three-year aggregate pounds purchased by all Eligible Processors in that fishery.

2.7.2 Use Caps.

Option 3. In the Northern Region annual use caps will be at 60% for the opilio crab fishery.

2.8 Other Optional Provisions:

The crab processing caps enacted by Section 211(c)(2(A) of the AFA would be terminated

Binding Arbitration System (from February 2003 motion)

The Council adopts the following elements for a system of binding arbitration to resolve failed price negotiations.

1. The Standard for Arbitration

The primary role of the arbitrator shall be to establish a price that preserves the historical division of revenues in the fisheries while considering relevant factors including the following:

- a. Current ex vessel prices (including prices for Class A, Class B, and Class C shares recognizing the different nature of the different share classes)
- b. Consumer and wholesale product prices for the processing sector and the participants in the arbitration (recognizing the impact of sales to affiliates on wholesale pricing)
- c. Innovations and developments of the different sectors and the participants in the arbitration (including new product forms)
- d. Efficiency and productivity of the different sectors (recognizing the limitations on efficiency and productivity arising out of the management program structure)
- e. Quality (including quality standards of markets served by the fishery and recognizing the influence of harvest strategies on the quality of landings)
- f. The interest of maintaining financially healthy and stable harvesting and processing sectors
- g. Safety
- h. Timing and location of deliveries
- i. Reasonable underages to avoid penalties for overharvesting quota and reasonable deadloss

2. Market Report

An independent market analyst selected by the mutual agreement of the sectors will present to both sectors and all designated arbitrators an analysis of the market for products of that fishery.

3. Selection of the Arbitrator(s) and Market Analyst

The market analyst and arbitrator(s) will be selected by mutual agreement of the PQS holders and the QS holders. PQS holders collectively must agree and QS holders collectively must agree. Processors may participate collectively in the selection process. The details of the selection will be decided at a later time.

4. Shares subject to binding arbitration

This binding arbitration system shall address price disputes between holders of delivery restricted IFQ (including Class A IFQ and Class C IFQ when subject to delivery restrictions) and holders of IPQ. Binding arbitration does not apply to the negotiation of price for deliveries under the class B IFQ and

Class C IFQ when not subject to delivery restrictions. C share holders, however, may elect to participate in the arbitration process prior to delivery restrictions taking effect.

#### 5. Shares of processor affiliates

Participation of processor affiliates in binding arbitration as IFQ holders will be determined by any applicable rules governing anti-trust. Any parties eligible for collective bargaining under the Fishermen's Marketing Act of 1934 will be eligible to participate in binding arbitration. No antitrust exemption should be made to enable processor affiliated IFQ holders to participate in arbitration.

#### 6. Payment of the arbitration and market analysis

The payment for the market analysis and the arbitrators will be shared by the two sectors. Cost shall be shared by all participants in all fisheries.

For shared costs, the payment of those costs shall be advanced by IFQ holders. The IFQ holders will collect the IFQ holders' portion of the shared costs by adding a pro rated surcharge to all deliveries of Class A crab.

#### 7. Quality dispute resolution

In cases where the fisherman and the processor cannot come to agreement on quality and thus price for crab, two mechanisms are suggested for resolving the price dispute-after the processor has processed the crab (to avoid waste from dumping the load at sea): (1) In cases where fishermen and processors have agreed to a formula based price, the two parties would take their normal shares of the price, after the disputed load is sold. (2) This type of dispute would most likely apply in cases where fishermen desire to stay with fixed dockside prices and there is disagreement on quality and therefore price. These cases could be referred to an independent quality specialist firm. The two parties in dispute would decide which firm to hire.

#### 8. Data used in arbitration

Under any arbitration structure, the arbitrator must have access to comprehensive product information from the fishery (including first wholesale prices and any information necessary to verify those prices).

Processors may participate in common discussions concerning historical prices in the fisheries. Subject to limitations of antitrust laws and the need for proprietary confidentiality, all parties to an arbitration proceeding shall have access to all information provided to the arbitrator(s) in that proceeding.

Data collected in the data collection program may be used to verify the accuracy of data provided to the arbitrator(s) in an arbitration proceeding. Any data verification will be undertaken only if the confidentiality protections of the data collection program will not be compromised.

#### 9. Enforcement of the Arbitration Decision

The decision of the arbitrator will be enforced by civil damages

#### 10. Oversight and administration of the Binding Arbitration system.

Oversight and administration of the binding arbitration should be conducted in a manner similar to the AFA cooperative administration and oversight. System reporting requirements and administrative rules should be developed in conjunction with the Council and NOAA Fisheries after selection of the preferred program.

The structure for the system of Binding Arbitration system shall be as described below:

## LAST BEST OFFER BINDING ARBITRATION

### GENERAL

The Last Best Offer Model provides a mechanism to resolve failed price and delivery negotiations efficiently in a short period before the opening of the season. The Model includes the following specific characteristics:

1. Processor-by-processor. Processors will participate individually and not collectively, except in the choice of the market analyst and the arbitrator/arbitration panel.
2. Processor-affiliated shares. Participation of processor-affiliated shares will be limited by the current rules governing antitrust matters.
3. Arbitration standard. The standard for the arbitrator is the historic division of revenues between harvesters and processors in the aggregate (across the entire sectors), based on arm's-length first wholesale prices and ex-vessel prices (Option 4 under "Standard for Arbitration" in the staff analysis). The arbitrator shall consider several factors including those specified in the staff analysis, such as current ex vessel prices for both A, B and C Shares, innovations, efficiency, safety, delivery location and timing, etc.
4. Opt-in. An IFQ holder may opt in to any contract resulting from a completed arbitration for an IPQ holder with available IPQ by giving notice to the IPQ holder of the intent to opt in, specifying the amount of IFQ shares involved, and acceptance of all terms of the contract. Once exercised, an Opt-in is binding on both the IFQ holder and the IPQ holder.
5. Performance Disputes. Performance and enforcement disputes (e.g. quality, delivery time, etc.) initially will be settled through normal commercial contract dispute remedies. If those procedures are unsuccessful, the dispute will be submitted for arbitration before the arbitrator(s). If those procedures are unsuccessful and in cases where time is of the essence, the dispute will be submitted for arbitration before the arbitrator(s). The costs of arbitration shall be paid from the fees collected, although the arbitrator(s) will have the right to assign fees to any party for frivolous or strategic complaints.
6. Lengthy Season Approach. For a lengthy season, an IPQ holder and an IFQ holder (or group of IFQ holders) may agree to revise the entire time schedule below and could agree to arbitration(s) during the season. That approach may also be arbitrated pre-season if the holders cannot agree.

### PROCESS

#### 1. Negotiations and Voluntary Share Matching.

At any time prior to the season opening date, any IFQ holders may negotiate with any IPQ holder on price and delivery terms for that season (price/price formula; time of delivery; place of delivery, etc.). If agreement is reached, a binding contract will result for those IFQ and IPQ shares. IPQ holders will always act individually and never collectively, except in the choice of the market analyst (which may occur at any time pre-season) and the arbitrator/arbitration panel for which all IFQ and IPQ holders will consult and agree.

#### 2. Required Share-Matching and Arbitration.

Beginning at the 25-day pre-season point, IFQ holders may match up IFQ shares not already subject to contracts with any IPQ shares not under contract, either as collective groups of IFQ holders or as individual IFQ holders (the offered IFQ Shares must be a substantial amount of the IFQ Holder(s)' uncontracted shares). The IPQ holder must accept all proposed matches up to its non-contracted IPQ share amount. All IFQ holders "matched" with an IPQ holder will jointly choose an arbitrator with that IPQ holder. The matched share holders are committed to the arbitration once the arbitrator is chosen (if the parties wish, the arbitrator may initially act as a mediator to reach an agreement quickly). Arbitration must begin no later than 15 days before the season opening date.

#### 3. Data.

The Arbitrator will gather relevant data independently and from the parties to determine the historical distribution of first wholesale crab product revenues (at FOB point of production in Alaska) between harvesters and processors in the aggregate (across the entire sectors). For a vertically integrated IPQ

holder (and in other situations in which a back-calculation is needed), the arbitrator will work with that IPQ holder and the IFQ holders to determine a method for back-calculating an accurate first wholesale price for that processor. The Arbitrator will receive a pre-season market report from the market analyst, and may gather additional data on the market and on completed arbitrations. The Arbitrator will also receive and consider all data submitted by the IFQ holders and the IPQ holder. The Arbitrator will not have subpoena power.

#### 4. Arbitration Decisions.

Arbitration will be based on a "last best offer" system, with the Arbitrator choosing one of the last best offers made by the parties. The Arbitrator will work with the IPQ and IFQ holders to determine the matters that must be included in the offer (e.g. price, delivery time & place, etc.) and will set the date on which "last best offers" must be submitted. The last best offers may also include a price over a specified time period, a method for smoothing prices over a season, and an advance price paid at the time of delivery.

If several groups or individual IFQ Holders have "matched" with that IPQ Holder, each of them may make a last best offer. Prior to submission of the last-best offers, the Arbitrator may meet with parties, schedule joint meetings, or take any actions aimed at reaching agreement. The Arbitrator will notify the IPQ holder and the IFQ holders of the Arbitration Decision no later than 10 days before the season opening date. The Arbitration Decision may be on a formula or ex-vessel price basis. The Arbitration Decision will result in a contract for the IPQ holder and the IFQ holders who participated in arbitration with that IPQ holder.

#### 5. Post-Arbitration Opt-In.

Any IFQ holder with shares not under contract may opt in to any contract resulting from an Arbitration Decision for an IPQ holder with IPQ that is not under contract, on all of the same contract conditions (price, time of delivery, etc.). If there is a dispute regarding whether the "opt in" offer is consistent with the contract, that dispute may be decided by the arbitrator who will decide only whether the Opt-in is consistent with the contract.

#### 6. Formula and Prices.

Throughout the year, the market analyst will survey the crab product market and publish periodically a composite price. That price will be a single price per species, based on the weighted average of the arm's length transactions in products from that species.

#### 7. Non-Binding Price Arbitration (from the April 2003 motion)

There will be a single annual fleet-wide arbitration to establish a non-binding formula under which a fraction of the weighted average first wholesale prices for the crab products from each fishery may be used to set an ex-vessel price. The formula is to be based on the historical distribution of first wholesale revenues between fishermen and processors, taking into consideration the size of the harvest in each year. The formula shall also include identification of various factors such as product form, delivery time and delivery location. The non-binding arbitration shall be based upon the Standard for Arbitration set out in the February 2003 Council motion, Item 1 including a. through i. As a part of this process, the arbitrator will review all of the arbitration decisions for the previous season and select the highest arbitrated prices for a minimum of at least 7% of the market share of the PQS. This provision allows for the aggregation of up to 3 arbitration findings that collectively equal a minimum of 7 percent of the PQS, to be considered for the highest price for purposes of this provision. If arbitration findings are aggregated with two or more entities, then the lesser of the arbitrated prices of the aggregated entities included to attain the 7 percent minimum market share of PQS shall be considered for purposes of developing the benchmark price. The arbitrator in the non-binding arbitration shall not be an arbitrator in the last best offer binding arbitration(s). This formula shall inform price negotiations between the parties, as well as the Last Best Offer arbitration in the event of failed price negotiations.

#### 3. Regionalization Elements

##### 3.1 Two regions are proposed:

a. Northern Region - All areas on the Bering Sea north of 56° 20' N. latitude. (This region includes the Pribilof islands and all other Bering Sea Islands lying to the north. The region also includes all communities on Bristol Bay including Port Heiden but excludes Port Moller and all communities lying westward of Port Moller.)

b. Southern Region - All areas not in the Northern Region.

**Suboption:** Regional categories for deliveries of Aleutian Islands brown king crab are split into a "Western" (west of 174° West longitude) and "Eastern" (east of 174° West longitude) area. 50% of the WAI IPQ brown king crab QS shall be processed in the W AI region.

### 3.2 Regional categorization of processing and/or harvesting quota shares

3.2.1 Categorization will be based on all historical landings. Periods used to determine regional percentages are the same as in Section 3.2.5.

There shall be no regional designation of the bairdi fishery shares. When there is a harvestable surplus of bairdi, an open season, and the vessel has bairdi quota, bairdi will be retained and delivered as incidental catch in the red/blue king crab and opilio fisheries.

#### 3.2.2 Options for the harvesting sector:

Option 2. Only Class A CV quota shares are categorized by region (applies to point of delivery and not point of harvest).

#### 3.2.3 Options for the processor sector:

Option 1. Processing quota shares and IPQs are categorized by region

3.2.4 Once assigned to a region, processing and/or harvesting quota shares cannot be reassigned to a different region.

3.2.5 Options for addressing any remaining mismatch of harvesting and processing shares within the region.

1. The base years for determining processing shares and the base period for determining the share assigned to each region shall be the same.

2. If the cumulative harvester quota associated with each region differs from the total regional share, by species, the harvester share, by species, shall be adjusted, up or down, in the following manner:

- a. The adjustment shall apply only to harvesters with share in both regions.
- b. The adjustment shall be made on a pro rata basis to each harvester, so that the total share among those harvesters, by region, equals the total share assigned to each region.

3. The adjustment shall only be on shares that carry a regional designation; Class B quota would be excluded from the adjustment.

3.3 Delivery and processing restrictions - the following provisions apply to the delivery and processing of crab with IFQs or IPQs that are categorized by region:

- a. Crab harvested with catcher vessel IFQs categorized for a region must be delivered for processing within the designated region
- b. Crab purchased with IPQs categorized for a region must be processed within the designated region.

### 3.4 Alternative Regionalization/Community Protection Option

#### **IPQ Caps (from the February 2003 meeting)**

The amount of IPQ in any year shall not exceed the percentage of the TAC for crab as follows:

For opilio, IPQ percentage times a TAC (after CDQ allocations) of 175 million pounds.

For Bristol Bay red king crab, IPQ percentage times a TAC (after CDQ allocations) of 20 million pounds.

IPQ (that would have been A shares but for the cap) issued in excess of IPQ limit shall be subject to regional landing requirements.

#### **Cool Down Period (from the December 2002 motion and February 2003 motion)**

A cooling off period of 2 years shall be established during which processing quota earned in a community may not be used outside that community. (from December 2002 motion)

During the Cool Down Period the following elements will apply (from the February 2003 motion):

1. The method to determine the shares associated with a community will be the same method used for allocating processing quota as established by the Council.
2. Community shall be defined as the boundaries of the Borough or, if no Borough exists, the first class or second class city, as defined by applicable state statute. A community must have at least 3 percent of the initial PQS allocation in any fishery based on history in the community to require continued use of the IPQs in the community during the cool down period.
3. 10% of the IPQs, on a fishery by fishery basis, may leave a community on annual basis, or up to 500,000 pounds, whichever is less. The amount that can leave will be implemented on a pro rata basis to all PQS holders in a community.
4. Exempt the Bairdi, Adak red crab and Western Aleutian Islands brown crab fishery from the cool down provision.
5. There should be an exemption from the requirement to process in the community if an act of God prevents crab processing in the community. This provision will not exempt a processor from any regional processing requirements, if there is processing capacity in the region.

#### **Regionalization of the Bairdi Fishery (from the February 2003 motion)**

If biological information indicates that the bairdi fishery is likely to become a directed fishery, the Council would consider the following management, along with other alternatives for management of that fishery:

If the bairdi fishery becomes a directed fishery, it shall be allocated according to the original distribution of the BBRKC and shall not be subject to the regionalization provisions of the Council Crab Rationalization program.

#### **Community Purchase and Right of First Refusal Options (from April 2003 motion)**

##### **1. General Right of First Refusal**

For communities with at least three percent of the initial PQS allocation in any BSAI crab fishery based on history in the community except for those communities that receive a direct allocation of any crab species (currently only Adak), allow CDQ groups or community groups representing qualified communities a first right of refusal to purchase processing shares that are based on history from the community which are being proposed to be sold for processing outside the boundaries of the community of original processing history in accordance with the provisions below.



#### Entity Granted the Right of First Refusal

The right of refusal shall be established by a contract entered into prior to the initial allocation of PQS which will contain all of the terms specified in paragraphs A through I below. The contract will be between the recipient of the initial allocation of the PQS and:

- 1) the CDQ group in CDQ communities
- 2) the entity identified by the community in non-CDQ communities.

In non-CDQ communities, the community must designate the entity that will represent the community at least 90 days prior to the deadline for submission of applications for initial allocations of PQS.

#### Contract Terms

- A. The right of first refusal will apply to sales of the following processing shares:
  1. PQS and
  2. IPQs, if more than 20 percent of a PQS holder's community based IPQs (on a fishery by fishery basis) has been processed outside the community of origin by another company in 3 of the preceding 5 years.
- B. Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement.
- C. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, IPQs must be used by the same company. In the event that a company uses IPQs outside of the community of origin for a period of 3 consecutive years the right of first refusal on those processing shares (the IPQs and the underlying PQS) shall lapse. With respect to those processing shares, the right of first refusal will not exist in any community thereafter.
- D. Any sale of PQS for continued use in the community of origin will be exempt from the right of first refusal. A sale will be considered to be for use in the community of origin if the purchaser contracts with the community to:
  1. use at least 80 percent of the annual IPQ allocation in the community for 2 of the following 5 years (on a fishery by fishery basis), and
  2. grant the community a right of first refusal on the PQS subject to the same terms and conditions required of the processor receiving the initial allocation of the PQS.
- E. All terms of any right of first refusal and contract entered into related to the right of first refusal will be enforced through civil contract law.
- F. A community group or CDQ group can waive any right of first refusal.
- G. The right of first refusal will be exercised by the CDQ group or community group by providing the seller within 60 days of receipt of a copy of the contract for sale of the processing shares:
  1. notice of the intent to exercise and
  2. earnest money in the amount of 10 percent of the contract amount or \$500,000 whichever is less.

The CDQ group or community group must perform all of the terms of the contract of sale within the longer of:

1. 120 days of receipt of the contract or
2. in the time specified in the contract.

H. The right of first refusal applies only to the community within which the processing history was earned. If the community of origin chooses not to exercise the right of first refusal on the sale of PQS that is not exempt under paragraph D, that PQS will no longer be subject to a right of first refusal.

1. Any due diligence review conducted related to the exercise of a right of first refusal will be undertaken by a third party bound by a confidentiality agreement that protects any proprietary information from being released or made public.

## **2. GOA First Right of Refusal**

For communities with at least three percent of the initial PQS allocation of any BSAI crab fishery based on history in the community that are in the area on the Gulf of Alaska north of 56°20'N latitude, groups representing qualified communities will have a first right of refusal to purchase processing quota shares which are being proposed to be transferred from unqualified communities in the identified Gulf of Alaska area.

The entity granted the right of first refusal and terms and method of establishing the right of first refusal will the same as specified in the general right of first refusal.

## **3. Community Purchase Option**

Allow for a community organization in those communities that have at least 3 percent of the initial PQS allocation of any BSAI crab fishery based on history in the community to be exempted from the restriction for the 150 days of sea time requirement under 1.6 Transferability and Restrictions on Ownership of QS.

## **4. Identification of Community Groups and Oversight**

For CDQ communities, CDQ groups would be the entity eligible to exercise any right of first refusal or purchase shares on behalf of the community. Ownership and management of harvest and processing shares by CDQ groups will be subject to CDQ regulations.

For non-CDQ communities, the entity eligible to exercise the right of first refusal or purchase shares on behalf of a community will be identified by the qualified city or borough, except if a qualified city is in a borough, in which case the qualified city and borough must agree on the entity. Ownership and management of harvest and processing shares by community entities in non-CDQ communities will be subject to rules established by the halibut and sablefish community purchase program.

## **5. Right of First Refusal is Non-assignable.**

The community right of first refusal is not assignable by the community group granted the right.

## **6. Fisheries Exempt from the Community Right of First Refusal.**

The Bairdi, Western Aleutian brown king crab and Adak red king crab fisheries are exempt from the right of first refusal.

## **4. Community Development Allocation (based on existing CDQ program):**

Option 2. Expand existing program to all crab fisheries approved under the rationalization program with the exception of the Western AI brown king crab.

Option 3. Increase for all species of crab to 10%. A minimum of 25% of the total CDQ allocation must be delivered on shore.

Option 5. For the WAI brown king crab fishery, the percentage of resource not utilized (difference between the actual catch and GHL) during the base period is allocated to the community of Adak. In any year, that sufficient processing exists at that location, the percentage of the difference between the GHL and actual catch, that was not harvested in these 4 years is not to exceed 10%.

#### Additional Provisions Concerning the Adak Allocation (from December 2002 motion)

Criteria for Selection of Community Entity to Receive Shares: A non-profit entity representing the community of Adak, with a board of directors elected by the community (residents of Adak) in a manner similar to the CDQ program. As a suboption, the shares given to this entity may be held in trust in the interim by the Aleut Enterprise Corporation and administered by it.

A set of use procedures, investment policies and procedures, auditing procedures, and a city or state oversight mechanism will be developed. Funds collected under the allocation will be placed in a separate trust until the above procedures and a plan for utilizing the funds for fisheries related purposes are fully developed. Funds will be held in trust for a maximum of 2 years, after which the Council will reassess the allocation for further action.

Performance standards for management of the allocation to facilitate oversight of the allocation and assess whether it achieves the goals. Use CDQ type management and oversight to provide assurance that the Council's goals are met. Continued receipt of the allocation will be contingent upon an implementation review conducted by the State of Alaska to ensure that the benefits derived from the allocation accrue to the community and achieve the goals of the fisheries development plan.

#### 5. Program Elements

RAM Division in conjunction with State of Alaska will produce annual reports regarding data being gathered with a preliminary review of the program at 3 years.

Option 2. Formal program review at the first Council Meeting in the 5th year after implementation to objectively measure the success of the program, including benefits and impacts to harvesters (including vessel owners, skippers and crew), processors and communities by addressing concerns, goals and objectives identified in the Crab Rationalization problem statement and the Magnuson Stevens Act standards. This review shall include analysis of post-rationalization impacts to coastal communities, harvesters and processors in terms of economic impacts and options for mitigating those impacts. Subsequent reviews are required every 5 years.

Option 5. A proportional share of fees charged to the harvesting sectors and processing sectors for management and enforcement of the IFQ/IPQ program shall be forwarded to the State of Alaska for use in management and observer programs for BSAI crab fisheries

#### 6. Cooperative model options:

##### 6.1 Coop model with the following elements and options:

1) Individual harvesting and processing histories are issued to both catcher and processors. (Harvesters under Section 1.3.2 a) which meet program qualifications. Processors under Section 2.1, 2.3, and 2.4 (Options 1-4) which meet qualifications of the program).

2) Cooperatives may be formed through contractual agreements among fishermen who wish to join into a cooperative associated with one or more processors holding processor history for one or more species of crab. Fleet consolidation within this cooperative may occur either by internal history leasing and vessel

retirement or by history trading within the original cooperative or to a different cooperative. A coop agreement would be filed annually with the Secretary of Commerce, after review by the Council, before a coop's catch history would be set aside for their exclusive use.

3.) Suboption only : There must be at least 4 or more unique harvester quota share holders engaged in one or more crab fisheries to form a coop associated with a processor. Vessels are not restricted to deliver to a particular plant or processing company.

4. New processors may enter the fishery by purchasing IPQ or by purchase of crab caught with B share landings or by processing CDQ crab. New processors entering the fishery may associate with cooperatives.

5. Custom processing would continue to be allowed within this rationalization proposal.

7. Regional Categories: As adopted earlier

8. Duration of coop agreements.

Option 4. A harvester quota shareholder may exit the cooperative at any time after one season. One season shall mean the season established by the Alaska Board of Fisheries for the fishery associated with the quota shares held by the harvester.

10. Observer requirements: Defer observer requirements to the Alaska Board of Fisheries.

11. Length of program: Same as earlier in Section 5.

12. Option for skipper and crew members: Same as developed earlier.

13. Catch Accounting - All landings including deadloss will be counted against a vessel's quota. Options for treatment of incidental catch are as follows: Same as developed earlier.

14. The North Pacific Fishery Management Council and the National Marine Fisheries Service shall have the authority to implement a mandatory data collection program of cost, revenue, ownership and employment data upon members of the BSAI crab fishing industry harvesting or processing fish under the Council's authority. Data collected under this authority will be maintained in a confidential manner and may not be released to any party other than staffs of federal and state agencies directly involved in the management of the fisheries under the Council's authority and their contractors.

A mandatory data collection program shall be developed and implemented as part of the crab rationalization program and continued through the life of the program. Cost, revenue, ownership and employment data will be collected on a periodic basis (based on scientific requirements) to provide the information necessary to study the impacts of the crab rationalization program as well as collecting data that could be used to analyze the economic and social impacts of future FMP amendments on industry, regions, and localities. This data collection effort is also required to fulfill the Council problem statement requiring a crab rationalization program that would achieve "equity between the harvesting and processing sectors" and to monitor the "...economic stability for harvesters, processors and coastal communities". Both statutory and regulatory language shall be developed to ensure the confidentiality of these data.

Any mandatory data collection program shall include:

A comprehensive discussion of the enforcement of such a program, including enforcement actions that would be taken if inaccuracies in the data are found. The intent of this action would be to ensure that accurate data are collected without being overly burdensome on industry for unintended errors.

The mandatory data collection program shall have the following elements (from the February 2003 motion):

- A. Purpose. The purpose of the data program is as set out in the June 2002 motion. The Council will require the production of data needed to assess the efficacy of the crab rationalization program and to determine its relative impact on fishery participants and communities.
- B. Type of data to be collected. The data collected shall be that needed to achieve the Council's purpose, with the following general guidelines:
  1. The information will be specific to the crab fisheries included in the crab rationalization plan.
  2. The data shall include information on costs of fishing and processing, revenues for harvesters and processors, and employment data
  3. The general guide for information requirements will be as set out in the draft surveys prepared by National Marine Fisheries Service dated 9/18/02, except
    - a) Non-variable costs shall be collected only as needed to explain and analyze variable cost data.
    - b) Collect a unique identifier for harvesting and processing crew members to explain changes in participation patterns as requested by the AP
  4. Historical information will be required as recommended by the Data Collection Committee.
- C. Method of Collection. Data shall be submitted to an independent third party agent such as the Pacific States Marine Fisheries Commission.
- D. Use of data. Data will be used following these general guidelines:
  1. Data shall be supplied to Agency users in a blind and unaggregated form.
  2. The agencies will develop a protocol for the use of data, including controls on access to the data, rules for aggregation of data for release to the public, penalties for release of confidential data, and penalties for unauthorized use.
  3. The agencies will revise the current Memorandum of Understanding governing the sharing of data between the State of Alaska and National Marine Fisheries Service, and will address in this MOU the role of the third party data collection agent.
  4. The Agency and Council will promote development of additional legislative and regulatory protection for these data as needed.
- E. Verification of Data. The third party collection agent shall verify the data in a manner that assures accuracy of the information supplied by private parties.
- F. Enforcement of the data requirements. The Council endorses the approach to enforcing the data requirements developed by the staff and the Data Collection Committee, as set out on page 3.17-20 in the February, 2003 document entitled "BSAI Crab Rationalization Program, Trailing Amendments", which provides:

Anticipated Enforcement of the Data Collection Program The analysts anticipate that enforcement of the data collection program will be different from enforcement programs used to ensure that accurate landings are reported. It is critical that landings data are reported in an accurate and timely manner, especially under an IFQ system, to properly monitor catch and remaining quota. However, because it is unlikely that the economic data will be used for in-season management, it is anticipated that persons submitting the data will have an opportunity to correct omissions and errors<sup>27</sup> before any enforcement action would be taken. Giving the person submitting data a chance to correct problems is considered important because of the complexities associated with generating these data. Only if the agency and the person submitting the data cannot reach a solution would the

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<sup>27</sup>The intent of the program is to have enforcement actions triggered by the willful and intentional submission of incorrect data or noncompliance with the requirements to submit data.

enforcement agency<sup>38</sup> be contacted. The intent of this program is to ensure that accurate data are collected without being overly burdensome on industry for unintended errors.

A discussion of four scenarios will be presented to reflect the analysts' understanding of how the enforcement program would function. The four scenarios are 1) a case where no information is provided on a survey; 2) a case where partial information is provided; 3) a case where the agency has questions regarding the accuracy of the data that has been submitted; and 4) a case where a random "audit" to verify the data does not agree with data submitted in the survey.

In the first case, the person required to fill out the survey does not do so. In the second case, the person fills out some of the requested information, but the survey is incomplete. Under either case that person would be contacted by the agency collecting the data and asked to fulfill their obligation to provide the required information. If the problem is resolved and the requested data are provided, no other action would be taken. If that person does not comply with the request, the collecting agency would notify enforcement that the person is not complying with the requirement to provide the data. Enforcement would then use their discretion regarding the best method to achieve compliance. Those methods would likely include fines or loss of quota and could include criminal prosecution.

In the third case the person fills out all of the requested information, but the agency collecting the data, or the analysts using the data, have questions regarding some of the information provided. For example, this may occur when information provided by one company is much different than that provided by similar companies. These data would only be called into question when obvious differences are encountered. Should these cases arise, the agency collecting the data would request that the person providing the data double check the information. Any reporting errors could be corrected at that time. If the person submitting the data indicates that the data are accurate and the agency still has questions regarding the data, that firm's data could be "audited". It is anticipated that the review of data would be conducted by an accounting firm selected jointly by the agency and members of industry. Only when that firm refuses to comply with the collecting agencies' attempts to verify the accuracy of the data would enforcement be contacted. Once contacted, enforcement would once again use their discretion on how to achieve compliance.

The fourth case would result when the "audit"<sup>39</sup> reports different information than the survey. The "audit" procedure being contemplated is a verification protocol similar to that which was envisioned for use in the pollock data collection program developed by NMFS and PSMFC. During the design of this process, input from certified public accountants was solicited in order to develop a verification process that is less costly and cumbersome than a typical "audit" procedure. That protocol involves using an accounting firm, agreed upon by the agency and industry, to conduct a random review of certain elements of the data provided.<sup>40</sup>

Since some of the information requested in the surveys may not be maintained by companies and must be calculated, it is possible that differences between the "audited" data from financial statements and survey data may arise. In that case the person filling out the survey would be asked to show how their numbers were derived<sup>41</sup>. If their explanation resolves the problem, there would be no further action needed. If questions remained, the agency would continue to work with the providers of the data. Only when an impasse is reached would enforcement be called upon to resolve the issue. It is hoped that this system would help to prevent abuse of the verification and enforcement authority.

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<sup>38</sup>The term enforcement agency in this case may or may not include the RAM Division and the Office of Administrative Appeals (in addition to NMFS Enforcement). Those details are still under discussion within NOAA.

<sup>39</sup>This "audit" could be the result of either the random review process that is contemplated or an "audit" triggered under scenario three.

<sup>40</sup>However, in cases of non-compliance in which enforcement has to be notified, the data verification process is likely to be more comprehensive.

<sup>41</sup>Any time a number must be derived, the survey will provide direction on how to calculate the information requested. This direction should help minimize differences. However, when discrepancies do arise, the firm will be given an opportunity to show how they derived their figures, and correct the information if necessary.

In summary, members of the crab industry will be contacted and given the opportunity to explain and/or correct any problems with the data, that are not willful and intentional attempts to mislead, before enforcement actions are taken. Agency staff does not view enforcement of this program as they would a quota monitoring program. Because these data are not being collected in "real" time, there is the opportunity to resolve occasional problems as part of the data collection system. Development of a program that collects the best information possible to conduct analyses of the crab rationalization program, minimizes the burden on industry, and minimizes the need for enforcement actions are the goals of the data collection initiative.

### Clarifications and Expressions of Council Intent

At its October 2002 meeting the Council clarified several issues in the June 10, 2002 motion identifying a preferred alternative for rationalizing the Bering Sea/Aleutian Islands crab fisheries. Since the Council motion of June was not a final action, the Chairman suspended the rule which would require a super majority to alter the motion. Decisions were by a simple majority of the Council. In addition, Hazel Nelson, who joined the Council since the June meeting, was permitted to participate in all votes. The following clarifications of the June motion were made:

1. A cutoff date of June 10, 2002 was established for the processor shares ownership cap grandfather provision - The ownership cap on processing shares to prevent persons from acquiring shares in excess of specific caps would be applied as of June 10, 2002. This cutoff date would prevent persons from acquiring interests in processing history in excess of the specified cap after the cutoff date.
2. Ownership/use cap distinction - The current council motion contains several provisions that limit ownership and use of the harvest and processing shares. These provisions include the following:
  - 1.6.3 contains provisions limiting the ownership of QS
  - 1.6.4 contains provisions limiting processor ownership of QS
  - 1.7.4 contains provisions limiting a vessels use of IFQs
  - 2.7.1 contains provisions limiting ownership of the PQS pool
  - 2.7.2 contains a use cap of 60 percent for the Northern region opilio crab fishery

The Council confirmed that the ownership caps limit ownership of the QS and PQS, which carry a long-term privilege, and IFQs and IPQs, which are annual allocations. Application of the caps to both types of shares is consistent with interpretation of caps in the halibut and sablefish IFQ program, in which use caps are interpreted as limiting IFQ use and the ownership of both QS and IFQs. This broad interpretation has two primary effects. First, this interpretation prevents individuals from accumulating shares in excess of the cap through leasing arrangements. Long term leasing, unlimited under a narrow interpretation of the caps, could allow a person to effectively control shares well in excess of cap. Second, under the broad interpretation the caps operate as a individual use cap since IFQ and IPQ holdings determine use. The IPQ use cap in the North region *C. opilio* fishery also operates as both a cap on ownership of PQS and IPQs in that region and as a use cap on IPQs in that region. The vessel use caps would limit the use of shares on a vessel but would not impose any limit on share ownership.

Although custom processing is permitted by the Council motion, the Council established that limits on ownership and use would count any crab custom processed by a plant toward the cap of the plant owner. The application of the cap to custom processing is intended to prevent consolidation, which could occur if custom processing is not considered.

3. Norton Sound red king crab fishery CDO allocation - The Council clarified that the increase of CDO allocations does not apply to the Norton Sound red king crab fishery. The Norton Sound fishery was excluded from the CDO allocation increase because its currently regulated under a super exclusive

permit program that prohibits its participants from participating in any of the other BSAI crab fisheries. The Norton Sound permit rules are for the benefit local, small vessel participants in that fishery.

4. Adak allocation in the WAI(Adak) golden king crab fishery - The Council motion provides for the allocation of unused resource (up to 10 percent) in the WAI (Adak) golden king crab fishery to the community of Adak. The Council asked for additional information for determining the entity to receive this allocation (see Additional Issues, below).
5. Regionalization of the initial allocation in the WAI (Adak) golden king crab fishery - In the Council's motion, the WAI golden king crab fishery is regionalized by designation of 50 percent of A shares (and corresponding processor shares) as west shares and by the remaining 50 percent of A shares (and corresponding processor shares) being undesignated. The Council clarified that individual processing share allocations would be made with the 50 percent west shares to participants with processing facilities in the west. If the allocations of processors with facilities in the west does not equal 50 percent, the remaining west allocation could be allocated on a pro rated basis to participants without facilities in the west. These remaining west shares could be pro rated so that each shareholder with west facilities would get the same portion of its initial allocation as west shares.

For harvesters, individual harvesters share allocations would be made with each harvester with west history allocated west shares. If the allocations of vessels with west history exceed 50 percent of the fishery, share allocations would be pro rated so that each shareholder with west history receives the same portion of its allocation as west shares.

6. Catcher/processor definition for purposes of processing crab harvested with Class B harvest shares<sup>2</sup> - A catcher/processor must be defined for purposes of applying the restriction on deliveries of B shares to catcher/processors (Section 1.3.3(b)). In a share based program, definition of this sector can be problematic because vessels used as catcher/processors are also used as floating processors. The Council clarified that for purposes of implementing this provision, a vessel that takes deliveries of crab harvested with Class B shares would be considered a floating processor for the duration of the season and would be prohibited from operating as a catcher/processor during that season. Likewise, a vessel that operates as a catcher/processor during a season would be prohibited from taking delivery of crab harvested with Class B shares during that season.
7. Sector cap on catcher/processors - Catcher/processors are permitted to purchase PQS from shore based facilities for use within 3 miles of shore (Section 1.7.2.3, Option 2). The "catcher/processor sector" also is capped at "the aggregate level of the initial sector-wide allocation" (Section 1.7.2.3, Option 8). The Council clarified the following effects of these provisions:
  - A) The catcher/processor sector-wide cap applies only to catcher/processor shares and not to the use or ownership of processing shares by catcher/processors.
  - B) Catcher/processor shares cannot be created by combining the processing privilege of PQS or IPQs with the harvest privilege of Class A QS or IFQs.
  - C) The catcher/processor sector-wide cap applies only to catcher/processor shares and not to the use or ownership of catcher vessel harvest shares by catcher/processors.
8. Regionalization of POS allocations to catcher/processors - Processing shares allocated to catcher/processors would be regionally designated based on the historic area of processing. State records of processing activity should be adequate for determining the location of processing activity.
9. Definition of a lease - the word "not" was inadvertently omitted from the definition of a lease. The definition was revised to read:

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<sup>2</sup> This clarification pertains only to processing of crab harvested with Class B harvest shares and does not pertain to processing of crab harvested with Class A IFQs or the harvesting of crab.



Leasing is defined as the use of IFQs on a vessel that the QS owner holds less than 10% ownership of vessel or on a vessel on which the owner of the underlying QS is not present (Section 1.6.2).

10. Grandfathering vessel use allocations in excess of the cap - The Council clarified that a vessel the activity of which is the basis for an allocation in excess of the vessel use cap would be grandfathered with respect to that allocation.
11. Cost recovery definition - The Council clarified that cost recovery funds would be collected in accordance with the current cost recovery program, which allows for the collection of actual costs up to 3 percent of ex vessel gross revenues. The Council provided that costs would be paid in equal shares by the harvesting and processing sectors (on all landings including landings of crab harvested with Class B IFQs). Catcher/processors would pay the entire 3 percent since catcher/processors participate in both sectors. A loan program for share purchases would be established with 25 percent of the fees collected. The motion authorized the collection of 133 percent of actual costs of management under the new program, which would provide for 100 percent of management costs after allocation of 25 percent of the cost recovery to the loan program.
12. Regionalization of the WAI (Adak) red king crab fishery - The processor share allocation in the WAI (Adak) red king crab fishery would be based on the historical landings in the WAI (Adak) golden king crab fishery. No landings in the golden king crab fishery were in the North during the qualifying years. The Adak red king crab fishery would therefore be entirely South. The South designation will be made despite the landing of a portion of the harvests in the Adak red king crab fishery in the North region during the qualifying years for vessels.
13. Rules governing cooperatives - The Council clarified the following rules for governing cooperatives:
  - A) Exemption from use caps - Cooperative members would not be subject to either the individual or vessel use caps, which would apply to IFQ holders that are not cooperative members.
  - B) Application of ownership caps - To effectively limit ownership, the number of shares (IFQs and QS) that each cooperative member could bring to a cooperative would be subject to the ownership caps (with initial allocations grandfathered).
  - C) IFQ allocations to cooperatives - The annual allocations of IFQs of cooperative members would be made to the cooperative, with use of those shares governed by the cooperative agreement.
  - D) Leasing - Leasing among cooperative members would be unlimited. For IFQ holders that are not cooperative members, leasing would be allowed for the first 5 years of the program.
  - E) Inter-cooperative transfers - Transfers between cooperatives would be undertaken by the members individually, subject to ownership caps. Requiring the inter-cooperative transfers to occur through members is necessary for the application of the ownership caps.
  - F) Four entities are required for a cooperative - The requirement for four owners to create a cooperative would require four unique entities to form a cooperative. Independent entities must be less than 10 percent common ownership without common control (similar to the AFA common ownership standard used to implement ownership caps).

- G) Monitoring and enforcement at the cooperative level - The monitoring and enforcement of harvest allocations would be at the cooperative level (rather than the individual level). Cooperative members would be jointly and severally liable for the actions of the cooperative.

Vertical Integration Caps (from the February 2003 motion)

The Council clarified that the 5 percent cap on QS holdings by processors shall exempt only the primary corporate processing entity from more restrictive generally applicable caps on QS holdings. All individuals and subsidiaries will be subject to the general caps on QS holdings.

A/B Share Linkage (from the April 2003 meeting)

At its April 2003 meeting:

The Council clarified that the A/B share component of QS will be linked for purposes of transfers.