

Petition for Emergency Action

Submitted to the North Pacific Fishery Management Council for Recommendation to the
Secretary of Commerce by

Inter-Cooperative Exchange

December 9, 2015

Dear Chairman Hull,

Inter-Cooperative Exchange (ICE) is requesting the support of the North Pacific Fishery Management Council for an Emergency Action Management Measure, pursuant to Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). We ask that the Council recommend that the Secretary of Commerce take emergency action to waive the 30% Individual Processing Quota (IPQ) use caps for custom processing of crab delivered under 2015-2016 Eastern and Western Bering Sea Tanner (BST or Bairdi) crab Catcher Vessel Owner (CVO) A share individual fishing quota (IFQ). If the requested emergency relief is not granted, a significant amount of Bairdi crab will be undeliverable.

Per its letter to the Council, ICE initially considered requesting emergency relief through a regulatory amendment converting stranded Bairdi A share IFQ into B share IFQ. However, on further consideration, it became clear that conversion would exclude the deliveries made under B share IFQ from binding arbitration in the event of a price dispute, and it is not clear how the arbitration system regulations could be amended to avoid that result, or whether it would be feasible to identify and amend the related arbitration filings and lengthy season agreements at this late date. ICE is therefore petitioning for the emergency regulatory relief described in the preceding paragraph.

Background

The Crab Rationalization Program (Program) allocated quota shares (QS) for nine Bering Sea and Aleutian Islands (BSAI) crab fisheries. Under the Program, 90% of the annual CVO IFQ pounds for each crab QS fishery are designated Class A IFQ. To make a delivery under Class A (or A share) IFQ, that IFQ must be matched on a pound for pound basis with corresponding IPQ.

Program regulations prohibit any person from using more than 30% of the IPQ pool for any crab QS fishery. (See 50 CFR 680.42(b)(1)(ii)). The IPQ use cap applies collectively to each person and all of its affiliates (as defined at 50 CFR 680.2), regardless of how many separate processing facilities or platforms that person and its affiliates may have. Specifically, the Program calculates a person's IPQ use by summing the total amount of IPQ that (1) is held by that person; (2) is held by other persons who are affiliated with that person through common ownership or control; and (3) is custom processed at a facility in which the IPQ holder has at least a 10 percent direct or indirect ownership interest. See Notice of Availability of Fishery Management Plan Amendment, Federal Register Volume 73, Number 177 (September 11, 2008), page 52807 (discussing Amendment 27).

Amendment 27 exempted custom processing of six crab QS species from the IPQ use cap calculation described above. See 50 CFR 680.42(b)(7). However, custom processing of Bairdi crab was not exempted, because Bairdi deliveries are not subject to regional landing requirements. See Amendment 27 Proposed Rule, Federal Register Volume 73, Number 183 (September 19, 2008), page 54351.

In the recent past, facilities owned by Trident Seafoods, Maruha-Nichiro (Aleyska/Westward/Peter Pan), Unisea, Inc. and Icicle Seafoods have accepted Bairdi A share deliveries. However, Icicle Seafoods is not processing crab this year. As a result, the only Bering Sea processing facilities currently available for Bairdi crab deliveries are controlled by three persons, i.e., Trident, Maruha-Nichiro and Unisea, each of which is subject to a 30% use cap limit. Therefore, the collective Bairdi IPQ use cap for the fishery is 90% of the total amount of Bairdi IPQ. As a result, 10% of the Bairdi CVO A share IFQ is effectively stranded.

As discussed below, ICE has concluded that the Trident, Maruha-Nichiro and UniSea facilities are the only viable Bairdi processing locations for the 2015/2016 season. The Bairdi fishery closes on March 31. Therefore, absent expedient emergency regulatory relief, ICE and other holders of Bairdi CVO A share IFQ will be prohibited from harvesting the full amount of Bairdi available.

Standard for Emergency Relief

Section 305(c) of the MSA allows the Secretary of Commerce to promulgate emergency regulations when the Secretary finds that an emergency exists involving any fishery. National Marine Fisheries Service (NMFS) policy guidance provides that such use “should be limited to extremely urgent, special circumstances where substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures.” The phrase “an emergency exists involving any fishery” has been defined in NMFS policy guidance as a situation that results from “recent, unforeseen events or recently discovered circumstances” that present “serious conservation or management problems in the fishery” and 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 rulemaking process.” See NMFS Instruction 01-101-07, Policy Guidelines for the Use of Emergency Rules, March 31, 2008.

An Emergency Exists

ICE believes that an emergency exists. ICE has been advised that IPQ holders are not able to receive and process more than 90% of the Bairdi Class A IFQ. As a result, 10% of the Bairdi Class A IFQ is stranded. As noted above, the Bairdi fishery closes on March 31. There is not sufficient time prior to that date to pursue regulatory relief through standard rulemaking procedures.

The Criteria for Emergency Action Have Been Met

ICE submits that each of the three criteria for emergency action are met.

(1) The situation results from recent, unforeseen events or recently discovered circumstances.

The present situation meets the “recent, unforeseen events or recently discovered circumstances” requirement. ICE did not anticipate that Icicle would terminate its 2015/2016 Bering Sea processing operations, nor could it have – it was not party to Icicle’s decision, and only heard about it after the fishery was underway. Consequently, ICE did not anticipate that the IPQ use cap would constrain its members and others from delivering the full amount of Bairdi available under their A share IFQ.

Regulations at § 680.20(h) require Class A IFQ holders to “share match” with processors holding available IPQ as a condition of making crab deliveries. ICE was able to share match its entire amount of Bairdi A share IFQ during the early season match period, and reasonably concluded it would be able to deliver under the matched shares. It was only informed to the contrary well after the 2015/2016 Bairdi fishery had opened and was being prosecuted by ICE member vessels.

(2) The situation presents serious conservation or management problems in the fishery

Stranding 10% of the Bairdi available under A share IFQ equates to a lost harvesting and processing opportunity of approximately 1,717,000 pounds of Bairdi crab, at an ex-vessel value of approximately \$5,100,000.00 (based on current pricing). This is a very important amount of revenue for the affected fleet. Taking into account reasonable multipliers associated with processing and selling the related product, the total financial impact is much greater.

During the 2014/2015 crab fishing year, the EBT IPQ was fully utilized, and notwithstanding a high *Opilio* total allowable catch (TAC) and difficult fishing conditions in the Western region of the Bairdi fishery, 78% percent of the WBT IPQ was used, as well. This year, the total allowable catch (TAC) for the critically important *Opilio* fishery is almost 40 percent lower than last year, and harvesters, processors and their crews are looking to the Bairdi fishery to offset that loss. Therefore, it is reasonable to assume that harvesters will exercise best efforts to fully harvest Class A IFQ in both the EBT and WBT fisheries this year, meaning there is a very high likelihood that the IPQ caps will be binding.

ICE has considered options which could obviate the need for emergency action, and does not believe there is a viable alternative.

To date, ICE has not been able to identify a Bering Sea shoreside facility or floating processor, other than those owned or controlled by Trident, Maruha-Nichiro or UniSea, that could process Bairdi deliveries for this season. Given the cost and logistical complexities associated with provisioning and staffing a processing facility at this late date, ICE has concluded that it is not feasible to have processing occur at an alternate Bering Sea location before the closure date of the fishery.

Delivering Bairdi crab to Kodiak has been suggested as an alternative. However, it is already a serious challenge to prosecute the Bairdi fishery on a commercially viable basis while

making deliveries in the Bering Sea. Notwithstanding the increase in the Bairdi TAC, the catch per unit of effort remains low, resulting in extended fishing trips and deliveries of partial loads (which are necessary to avoid excessive deadloss during an extended trip). The additional direct cost of running to Kodiak, the fishing days lost while making the run from the Bering Sea and back and the increased deadloss, taken together, prevent delivering in Kodiak from being a commercially viable alternative.

(3) The situation 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 to the same extent as would be expected under the normal rulemaking process.

This situation could be addressed through an emergency rule that would waive the 30% IPQ use cap for custom processing of crab delivered under 2015/2016 EBT and WBT A share IFQ. All other aspects of the Program would be maintained, and the immediate benefit would be avoiding the losses identified above.

On the other hand, in order to provide a regulatory remedy through the normal Council process of notice-and-comment rule making, the following would need to occur within the next three months in order to permit the crab to be harvested:

- (a) the Council would have to produce an analysis with a range of alternatives and take action. Given the timing of Council meetings and the closure date of the EBT and WBT fisheries, this action would have to occur during the December Council meeting. However, no notice has been provided to the public, and no analysis has been initiated, much less completed.
- (b) NMFS would need to issue a proposed rule, provide a public comment period, assess those comments, and publish a final rule. NMFS typically requires at least a year to complete a final rule after the Council has taken final action. These regulatory steps certainly could not be completed in less than 3 months, even if the Council were able to take action at its December Council meeting.

ICE believes there is simply not enough time for the normal process to be followed without incurring the losses identified above. On the other hand, we note that emergency action is limited in duration, and unless this situation is resolved before emergency regulatory relief expires, we expect that the normal notice and comment process and deliberative consideration of the potential impacts would take place in connection with any further action. ICE therefore believes that the immediate benefits of emergency action outweigh the value of that process and deliberation at this time.

Emergency Relief is Justified

NMFS Policy finds that emergency action can be justified under one or more of the following situations: (1) ecological (to prevent serious damage to the fishery resource); (2) economic (to prevent significant direct economic loss or preserve a significant economic opportunity that otherwise might be foregone); (3) social (prevent significant community impacts

or conflicts); or (4) public health. ICE believes that there are both economic and social justifications for emergency action.

The economic loss of stranding 10% of the 2015/2016 Bairdi A share IFQ is described above. This loss would be suffered by ICE harvesters and their crews, and the related consequential losses would be suffered by processors, their employees and the communities that depend on this commercial activity.

Compliance with National Standards

As with any fishery policy or management measure incorporated into a fishery management plan, an emergency action must also comply with the MSA National Standards. Compliance with each National Standard is addressed below.

National Standard 1: Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the U.S. fishing industry.

The requested emergency action will enable the entire EBT and WBT total allowable catches to be harvested, processed and marketed to achieve the optimum yield of this crab fishery. If the emergency action is not taken, it is likely that a substantial percentage of the TAC for the Bairdi fishery will be stranded, preventing achievement of optimum yield.

National Standard 2: Conservation and management measures shall be based on the best scientific information available

Nothing in the request alters or disrupts the BSAI Crab Plan Team's biological assessment of the EBT and WBT fisheries or the related TAC.

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 recommended action complies with National Standard 3 because no change to the management of the crab fisheries is contemplated or recommended.

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 allocations shall be: (1) fair and equitable to all such fishermen ; (2) reasonably calculated to promote conservation; (3) carried out in such a manner that no individual,, corporation, or other entity acquires an excessive share of such privileges

The recommended action complies with National Standard 4 because no direct allocation of any fishing privileges is being made. In fact, this emergency action request preserves the allocation structure adopted by the Council and implemented by the Secretary of Commerce.

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.

The requested emergency action complies with National Standard 5 because waiving the IPQ use cap for the Bairdi fishery to the extent necessary to avoid stranding Bairdi A share IFQ promotes the efficient utilization of fishery resources. Further, this action is not allocative; it would merely allow the contemplated harvesting and processing to take place under allocations already made.

National Standard 6: Conservation and management measures shall take into account and allow for variations among and contingencies in fisheries, fishery resources, and catches.

The requested emergency action complies with National Standard 6 in that the action is responsive to a fishery contingency that ICE did not foresee and could not have reasonably foreseen.

National Standard 7: Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

The recommended action complies with National Standard 7 because the requested action will not impose greater costs on the harvesters or processors. To the contrary, failure to grant the relief requested would likely result in unnecessary costs and economic harm.

National Standard 8: Conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks) take into account the importance of fisheries resources to fishing communities in order to: (1) provide for the sustained participation of such communities; and (2) to the extent practicable, minimize adverse economic impacts on such communities

A substantial amount of the stranded Bairdi A share IFQ and related IPQ is held by community development quota (CDQ) groups. If they cannot harvest and deliver under their QS, the resulting harm to their member communities will be significant. Similarly, the EBT and WBT processing activity occurs in communities that are dependent on crab fishery revenue.

National Standard 9: Conservation and management measures shall, to the extent practicable: (1) minimize bycatch; and (2) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch

The requested action will not increase bycatch or bycatch mortality beyond the levels contemplated when the 2015/2016 Bairdi TAC was set.

National Standard 10: Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

In the absence of the emergency action requested, it is quite possible that a “race” for processing cap room occurs. Because of the uncertainty when a processing cap might be reached, crab harvesters may rush to make sure that crab harvested under their Bairdi A share IFQ is delivered and processed, at increased safety risk to their vessels and crew. The emergency action will eliminate this risk.

Specific Request for Emergency Action

For the reasons provided above, ICE requests that the Council support an emergency rule that would waive the 30% IPQ use cap for custom processing of crab delivered under 2015/2016 EBT and WBT A share IFQ.

Thank you for your consideration.

Sincerely,

Erling (Jake) Jacobsen
Executive Director, ICE

C.L. (Louie) Lowenberg
President, ICE

cc Dr. James Balsiger, Regional Director, Alaska Region, National Marine Fisheries Service
Mr. Glenn Merrill, National Marine Fisheries Service
Mr. John Iani, North Pacific Crab Association