

**ALASKA BOARD OF FISHERIES
FINDINGS ON BRISTOL BAY RED KING CRAB FISHERY
MARCH 1999 MEETING, ANCHORAGE**

I. Introduction

At its March 1999 meeting in Anchorage, the Board of Fisheries (Board) adopted regulations that (1) move the opening of the Bristol Bay red king crab season from November 1 to October 15 (2) and extend the preseason gear operation restriction from 14 to 30 days and include trawl with the types of gears that are prohibited for those who want to participate in the crab fisheries. These written findings explain the board's reasoning for these regulatory actions and satisfy the requirement for written findings found in the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crab (FMP).

II. Season Change

The Board moved the Bristol Bay Red King Crab season up by sixteen days to benefit the industry by reducing the time between the Pribilofs and St. Matthews king crab fisheries, saving time and money for the fleet. Information before the Board showed that an extended period between fishing seasons makes it both expensive and difficult for vessels to hold crewmembers, requires vessels to remain proximal to the Bering Sea grounds for long periods that raise costs, and makes vessel yard maintenance difficult to schedule. On the other hand, moving the season up two weeks would help address these concerns and provide a longer maintenance window prior to the C. opilio Tanner crab fishery. The Board recognized that an earlier season would have an impact on those vessels that fished for groundfish in the same area and then participated in the crab fishery because they usually fished through October. But the Board weighed that impact against the benefit to the rest of the fleet and found the benefits to the fleet from an earlier season outweighed the negative impacts.

The Board also noted that the earlier season was likely to result in somewhat better weather and vessel safety conditions. The Board acknowledged that the earlier season might result in some slight increase in dead loss and meat fill, but found those impacts insignificant when weighed against the benefits of an earlier season.

A. The Board Information-gathering and Meeting Process

The Board acted on a proposal that had been submitted to it by a crab fisherman before April 10, 1998, almost a year before its March 1999 meeting in Anchorage. This proposal, along with all other proposals submitted the Board for consideration during its 1998-99 meeting cycle, was published in the Board's annual proposal book and was

distributed to the public in July 1998. The proposal was reviewed by user groups and advisory committees, including the Pacific Northwest Crab Industry Advisory Committee (PNIAC), which was established by the FMP to provide nonresidents of Alaska access to the FMP and Board regulatory process. At its meeting in Seattle on January 6, 1999, the PNIAC voted to oppose Proposal 287 and support the status quo. Public Comment 37 at 4, March 1999 Board of Fisheries Record, RC 1.

The Board recognized that Proposal 287, as a request to move the opening season date from November 1, to October 10, was an FMP Category 2 framework issue, requiring consideration of specific FMP criteria and the Magnuson-Stevens Act national standards, as well as consistency with state legal requirements.

The Board took staff reports at the beginning of the meeting, took public testimony, and then broke into committees to address similar proposals. Proposal 287 was assigned to Committee E – Bristol Bay King Crab. See, RC 142, Committee E Report. Other relevant reports or comments to the Board were: Staff Reports, RC4 (Tabs 1, 2, 13, 14, 17, 27, 28, 29); Staff Comments, RC4 (Tab 37, page 11); Advisory Committee Reports, RC110; and Public Comments, PC 37 and RC69, RC85, RC102, RC111.

During committee discussion of this issue, it was noted that this proposal would move the opening closer to the Pribilof and St. Matthew fisheries in the Bering Sea. The stated basis for the proposal was to avoid “higher start-up costs for the entire industry. Weather concerns are also a factor.” The goal was to reduce down time between the early red/blue king crab fishing seasons and the Bristol Bay red crab season. The proposer stated that he believed that moving the November crab fishery closer to the September crab fisheries would provide real benefits by eliminating the cost of mobilizing vessels and processing crews for the Bristol Bay season and allow a time window for vessel maintenance.

The committee discussed the pros and cons of moving the start date from November 1 to October 10. Though many agreed there were benefits, many of the participants were uncomfortable with a starting date as early as October 10. The proposer suggested moving the opening date to October 15. There was lengthy discussion on whether to move the start to the 10th or the 15th of October. There was consensus from all but one member of the public to move the date to October 15.

The Committee report and public testimony indicated that the following industry points for and against this proposal were raised in the committee discussion:

Points against:

- (1) crabs may have less meat fill than if the season starts on November 1;
- (2) possible dead loss if surface and bottom temperatures are greatly different;
- (3) fishermen participating in the Bering Sea Korean hair crab fishery would be unable to participate in the Bristol Bay red king crab fishery;

(4) trawl vessels which have fished in this area would be excluded regardless if the date were the 10th or 15th of October, because the trawl fleet normally fishes through the end of October.

Points for:

- (1) moving the red crab season just a few weeks earlier allows better market timing to distribute crab into the Japanese holiday season markets;
- (2) better weather in October for small boat safety concerns;
- (3) extra time for vessel maintenance after red crab fisheries and before the start of Bering Sea *C. opilio* fishery;
- (4) less down time between the Pribilof/St. Matthew and Bristol Bay king crab fisheries, which would save the fleet and processors money;
- (5) eliminating trawl vessels from 'crossing over' to the Bristol Bay red king crab fishery from the pollock fishery.

Discussion covered all of the above points and concerns. The Department indicated that it would work with the Bering Sea Korean hair crab fishers to eliminate their fishery's conflict with the Bristol Bay red king crab fishery if this proposal were adopted.

One member of the committee representing trawl catcher vessels expressed concern that this proposal will exclude some crab vessels that have historically also fished in the Bristol Bay red king crab fishery after the trawl season. He stated that this would be the case regardless if date was set for the 10th or the 15th of October because the trawl fleet fishes through the end of October.

From the committee, the public panel recommendation was to move the opening date to October 15. This recommendation was a consensus from all but one member, representing trawl fishers. The recommendation from the Board committee members was also to move the opening date to October 15 and provide the full Board with regulatory substitute language for Proposal 287.

B. Board Deliberations of Proposal for Season Change

The full Board received the committee minutes and a review by Committee Chair who described issues brought forward in the Committee. Transcript of Board Deliberations on Proposal 287 (Tr.) at 1-4. Substitute language from RC 142, p. 17, amending 5 AAC 34.810(b)(1) to provide a starting season date of October 15, was placed before the Board for its consideration and vote. Tr. 1. The Board went through the FMP framework for fishing seasons and discussed the various National Standards pertinent to this decision. As explained below, the Board attempted to meet the economic, safety and social concerns without significantly reducing quality or increasing deadloss.

1. The Board Properly considered the FMP Category II criteria for fishing seasons.

Regulations opening commercial crab fishing seasons are FMP Category II measures. The FMP contains specific criteria to be considered by the Board in adopting such measures. FMP at 35-36. The Board's consideration of the criteria is outlined below.

Minimization of deadloss: The FMP lists minimization of deadloss as one goal of the FMP: "Deadloss has been found to increase if crabs are in soft-shell condition, if they are held for long time periods, if holding tanks are contaminated with fresh or warm water, or if crabs are handled too often." FMP at 36.

The Board recognized that the pre-1990 September seasons saw more dead loss than the current season. Tr. 8-11. ADF&G presented information on the historical rates of deadloss in the fishery. RC 4, Tab 2 at 7-8. The data indicated that during the years when the season opened on September 25 (1985-1989), the average rate of deadloss was .0094. RC 4, Tab 2 at 7. Although, if one extremely high year, 1986 with a rate of .0249, was removed from the equation, then the average rate for the remaining years dropped to .0058. *Id.* The average deadloss rate for the years that the season opened on November 1 (1990-93, 1996-98) was .0044. *Id. at 8.* Four of the later years (1990, 1991, 1993 & 1998) had higher deadloss rates than two of the earlier years (1985 & 1988). *Id. at 7-8.*

There was some speculation that increases in deadloss were caused by the temperature differential between the surface and the bottom. In the summer months, the temperature is more stratified, but by November the stratification has broken down. Tr. 9. But in the Board discussion, they recognized that surface water temperatures change from year to year. Tr. 9. The Board asked staff whether a two-week change was significant. Tr. 10. Staff reported to the Board that changes in dead loss were more associated with fresh water than ocean temperature, and that any "difference in dead loss due to temperature over a two-week period would be quite insignificant." Tr. 11. The Board agreed with that conclusion. Tr. 12, 16-17.

Although not expressly expanded upon during the March Board meeting discussion, the Board is aware that past Board records indicate that dead loss was a function of crab caught in pre-season bait-up periods and then held in holding tanks when fresh water was prevalent and adequate processing not available. See, Tr. 11. When processing capacity would catch up with production, dead loss would decline. In early years, large GHs and long seasons exacerbated this problem and increased dead loss. Fishermen tended to overload their tanks with crab and hold them too long before off-load.

Product quality: Another goal under the FMP for opening seasons is achieving the best possible product quality. FMP at 36. The Board discussed the potential for crab having more or less meat fill depending on the starting date. Tr. 7-8. Some of the information indicated that crab caught in September were smaller and weighed less than those caught in November. Dr. Otto indicated that the difference may have been partially due to differences in recruitment and thus the size of crabs available to the fishery. Crabs gained about a pound between the old and new seasons. The impact of a two-week

period on weight gain, as opposed to five weeks, was less certain. Tr. 8. The Board concluded that the closer the start date was to September 25, the previous start date, the less meat fill expected, and the closer to November 1, the more the fill. So somewhere in between may produce some amount of quality consideration. The Board felt that any loss in meat fill would be offset by the advantages of an earlier season.

Minimization of fishing during severe weather conditions: Another FMP goal is to minimize fishing during severe weather conditions. FMP at 36. In regards to this issues, some small vessel owners testified that an earlier season would have better weather for small boat safety. RC 142 at 6. But here again, the Board noted that though the old September season was best and November period is more of a concern, moving it only two weeks is not a huge safety gain. Tr. 12, 17.

Minimization of the cost of industry operations: Another FMP goal for opening seasons is to minimize the cost of industry operations. FMP at 36. The Board noted that hiring and keeping crews was clearly problematic throughout these fisheries because of the shortening of seasons and because declining fishing productivity influences prices and, therefore, crew shares. Tr. 12. Extended periods between fishing seasons makes it both expensive and difficult to hold crewmembers. Tr. 12. Additionally, it requires vessels to remain proximal to the Bering Sea grounds for long periods that raise costs and make vessel yard maintenance difficult to schedule. Tr. 3, 12. Moving the season up two weeks would help address these concerns and provide a longer maintenance window prior to the opilio fishery. Tr. 3, RC 142 at 6.

Coordination of fisheries: The FMP also requires the Board to consider methods that coordinate the fisheries that have the same demands on harvesting, processing and transportation systems. FMP at 36. Additionally, it states that seasons can be timed relative to one another to spread fishing effort, prevent gear saturation, and allow maximum participation in the fisheries by all elements of the crab fleets. *Id.* Overlapping or reducing the space between various crab fisheries achieves this goal for the crab industry.

The demands on harvesting, processing and transportation systems in the crab fishery did not appear to conflict with those other fisheries that are ongoing at the same time. The Board was given no information to that effect. There appeared to be no specific concerns of gear saturation or spreading of fishing effort presented by a sixteen-day advance in the opening of the season.

Concern over participation of the Korean Hair crab fleet was dealt with, and the Board recently took steps to address participation by the Area O Brown king crab fleet. Tr. 16.

The Board was quite aware that an earlier season would have an impact on the participation in the crab fishery of those trawl vessels that fish in the same area for pollock during a season that would overlap with tan earlier season. RC 132, Tr. 18. The record indicated that crabber/trawlers that fish in the Bering Sea B-season pollock fishery

would often be forced to decide between fishing throughout the entire B-season pollock fishery or stopping early to participate in the Bristol Bay king crab fishery. Tr. 6-7. This would have the tendency to reduce the number of trawl participants in the crab fishery.

One industry committee member indicated that moving the season would benefit dedicated crab operators since it could reduce opportunity to trawl cross-over vessels who wanted to fish Bristol Bay red crab. But the Board felt that this was an inappropriate basis for them to make a decision, as expressed by Vice-chair Dan Coffey:

[A]s I said in our earlier presentation, I don't think we should, by indirection, do that which we are not allowed to do directly, which is limit entry into a fishery. If the effect of our action is justified by other things, such as the pluses that Mr. Engel identified and things in the – in the management plan, which we've been discussing, and it has a consequence of excluding folks from the fishery, but we're doing it for legitimate reasons within the management plan and within our authority, well, so be it, that happens a lot, the unintended allocative consequence, because we're facing that all the time. And – I'm perfectly willing to accept those consequences. What I'm not prepared to do is to take action that is not otherwise justified simply for the purpose of excluding people from the fishery, particularly in light of the instructions for maximum participation in the fishery....

Tr. 18-19.

The earlier season adopted by the Board does not "limit access" to the fishery as contemplated by FMP Category I provisions. The circumstances described there involve limitations on admission to a user group and restrict who can participate in the fishery at all.

In this case, the start date does not exclude any fishers from participating in the Bristol Bay red king crab fishery unless by their own choice to participate in another fishery. Every regulation that limits a fishing season has the potential to require some who might otherwise be able to participate, but want to participate in another ongoing fishery, to make tough decisions.

In this fishery, as in any other fishery such as salmon or groundfish, there are usually other fisheries that overlap or occur at the same time, preventing fishers from participating fully in both. Considering the actual level of annual participation by vessels that fish crab; it is obvious that each participant must annually evaluate whether to participate in a particular crab fishery or use their vessel to some higher economic benefit. The election to participate in a particular fishery is a universal quandary that fishermen face annually. The Board made changes for legitimate reasons within the FMP and within its authority, and unintended consequences occur frequently in fishery management. If the Board could not allow any overlap in such fisheries, consideration of all other criteria and public policy concerns would be lost to the Board.

Because the Board recognized that a decision might have allocative effects, even though not intentional, the Board reviewed and discussed the allocation criteria found in AS 16.05.251(e).

Reduction of costs of enforcement and management: The department did not believe the reduction of enforcement and management costs before, during and after the season would be significantly impacted by the change in start date.

2. The Board properly considered the Magnuson-Stevens Act National Standards

Since this was a Category II measure with specific criteria laid out for the Board's consideration in the FMP, the Board did not spend a lot of time discussing the Magnuson-Stevens Act National Standards, presuming that the specific FMP criteria were designed to produce regulations consistent with the National Standards. The Board, in reviewing each of the National Standards as they relate to this proposal, found that many of the standards were not applicable, and that those that were applicable were largely irrelevant due to the small shift in season timing.

National Standard 1: The Board did not believe the prevention of overfishing was an issue in its decision. Tr. 13-14.

National Standard 2: The Board believed it had "some pretty good data on the criteria" to consider and did not think it was "relying on anything other than the best scientific information." Tr. 14.

National Standard 3: It didn't believe management of the crab stock as a unit throughout its range was at issue. Id.

National Standard 4: As to discrimination between residents of different states, the Board felt there was no discrimination involved in its decision because there were both state residents and nonresidents involved in the fisheries, and that season changes did not discriminate relative to residency. Tr. 14.

National Standard 5: Even though not expressly addressed to the National Standard 5, the Board decision was based largely on its desire to promote efficiency in the utilization of the the Bristol Bay king crab stocks. Tr. 3, 12, 16.

National Standard 6: The Board found little guidance in this standard. Tr. 14.

National Standard 7: Even though not expressly addressed to the National Standard 7, the Board decision was based largely on its desire to minimize costs in the utilization of the the Bristol Bay king crab stocks. Tr. 3, 12, 16.

National Standard 8: The Board felt that determining the effect on communities was very, very difficult to determine, and could not see how the season change made a difference. Tr. 15.

National Standard 9: The minimization of mortality of bycatch was discussed but not felt to be significantly affected by the season change.

National Standard 10: While the Board felt like an earlier season meant it would be a little safer for human life at sea, it also believed the magnitude of the change contemplated by the regulation would outweigh all other considerations. Tr. 15.

Generally, the Board noted that the primary focus would be on deadloss, quality and safety – but only in respect to small incremental changes. What seemed to be industry’s real benefit, and the purpose behind the proposal, was to minimize the cost of industry operation. All of the other items were a balance, one against the other, but only to small amounts of gain or loss. Tr. 15.

III. Preseason Gear Exclusion

At its March 1999 meeting, the Board amended its regulations that already required participants in king and Tanner crab fisheries to refrain from operating any pot gear during the 14 days immediately prior to the seasons to include trawl gear in the restriction and in the king and *C. bairdi* Tanner crab fisheries, to extend the preseason exclusion period from 14 to 30 days. The Board took this action to close any loopholes to the “fair start” of the seasons, and to maintain a slower pace in fisheries like the Bristol Bay red king crab fishery, which are otherwise subject to overfishing. The Board’s intent was to remove all opportunity for prospecting, and not to just react to accusations of past prospecting.

A. Historical Background

Since 1987, the Board has had regulations that required participants in king crab fisheries to refrain from operating gear in the area in the 14 day period before the season opens. The purpose of this restriction was to prevent the opportunity for prospecting or early fishing by crab fishermen, to slow down the pace of the fisheries and to put all participants on a level playing field at the opening of the season. Originally, the only gear restricted was king and Tanner crab pots. Former 5 AAC 34.050(j). But in the fall of 1989, both NMFS and ADF&G noticed a large increase in the registration for the cod pot fishery in the Bristol Bay area prior to the red king crab fishery. With NMFS’ cooperation, an emergency regulation was adopted to exclude pots of any kind during the days leading up to the king crab season. Emergency Regulation 5 AAC 34.050(k) (Eff. 9/15/89 to 1/12/90, Reg. 112). By the following season, the amendment had been made permanent, excluding the operation of any kind of pots to prevent the opportunity for prospecting for crab under the guise of cod fishing with pots. 5 AAC 34.050(j) (Eff. 9/19/90, Reg. 115)

From a historical statewide perspective, the Board has needed to address the reoccurring concern with vessels prospecting for high valued species prior to that species' season opening. The original regulation allowed a preseason bait-up period which is clearly within Category 3, gear placement and removal. Because of dead loss concerns, the BOF stopped allowing preseason bait-up periods.

To assure that no vessels were on the grounds early with baited gear, they implemented tank checks and preseason gear exclusion periods in 1987 to preclude prospecting with commercial, subsistence or personal use crab pots. This was a case where one regulation (pre-season bait up) rolled into the other (gear exclusion /tank checks). It was modified two years later to include all pot gear after a large portion of the crab fleet started fishing P. cod with pots on the red king crab grounds just prior to a crab opener. A further illustration of statewide prospecting concerns was addressed this year (1999) by the Board when it adopted a 30-day preseason restriction period for the red and Tanner crab fisheries in Southeast Alaska. Since groundfish trawling is not allowed in Southeast, trawls were not included in the regulation.

B. Public Testimony and Committee Process

The Board had before it several proposals dealing with the preseason gear exclusion period for the BSAI crab fisheries. Proposal 291 was submitted by the department and would have increased the preseason gear exclusion from 14 days to 30 days for only the Bristol Bay red king crab fishery. Proposal 354 would have included all types of gear, including trawl gear, in the current 14-day exclusion period for all king and Tanner crab fisheries. Proposal 355 sought to include trawl gear in the exclusion, as well as to extend the existing 14-day preseason gear exclusion period to 30 days in all king and Tanner crab fisheries. Proposals 354 and 355 were submitted by Arni Thompson, executive director of Alaska Crab Coalition. According to comments accompanying these two proposals, they were intended to provide a "fair start" to all crab fishermen by requiring a preseason gear exclusion period of 30 days between using sport, subsistence or commercial pot or trawl gear on the commercial crab grounds prior to the commercial crab fishery. RC 1.

These proposals had been submitted to the Board before April 10, 1998, almost a year before its March 1999 meeting in Anchorage. These proposals, along with all other proposals submitted the Board for consideration during its 1998-99 meeting cycle, were published in the Board's annual proposal book and were distributed to the public in July 1998. The proposals were reviewed by user groups and advisory committees, including the Pacific Northwest Crab Industry Advisory Committee (PNIAC), which was established by the FMP to provide nonresidents of Alaska access to the FMP and Board regulatory process. At its meeting in Seattle on January 6, 1999, the PNIAC voted to endorse Proposals 291 and 354, and to postpone comments on Proposal 355 until ADF&G completed its analysis. RC 1, Public Comment 37, page 5.

The Board took staff reports at the beginning of the meeting, took public testimony and then broke into committees to address similar proposals.

Proposal 291 was assigned to Committee E – Bristol Bay King Crab issues. RC 142 is the committee report. Board Committee Members were Don Coffey (Chair), Virgil Umphenour, and Russell Nelson. Staff and industry committee members are listed in RC 142. Other relevant reports or comments to the Board were: Staff Reports, RC 4, Tabs 1, 2, 13, 14, 17, 27, 28, 29; Staff Comments, RC 4, Tab 37, page 19; Advisory Committee Reports, RC 110; Public Comments, RC's 69, 85, 102, 111, and 132.

Proposals 354 and 355 were assigned to Committee D – Bering Sea/Aleutian Islands King Crab issues. RC 135 is the committee report. Board Committee Members were Ed Dersham (Chair) and Dan Coffey. Staff and industry committee members are listed in RC 135. Other relevant reports or comments to the Board were: Staff Reports, RC 4, Tabs 1, 3, 4, 19 (Federal Requirements), 20 (FMP), 27, 30, & 34; Staff Comments, RC 4, Tab 37, page 33; Advisory Committee Reports, RC 110; and Public Comments, RC's 69, 85, 102, 111 and 132.

In committee it was noted that Proposal 355 would include any and all fishing gear in a 30-day pot gear exclusion period prior to any king or Tanner crab fishery. RC 135 at 15. The proposal to extend the preseason restriction period and include trawl gear arose from the concern that trawl equipped crab vessels have an unfair advantage over other crab fishers. *Id.* Public testimony expressed concern that trawls vessels can use pelagic gear in the pollock fishery or bottom gear for cod or flatfish, right up to the registration deadline period for the king crab fishery. *Id.*

Trawl gear is clearly an efficient crab survey method. RC 135 at 15. However, fish ticket data does not show an increase in “average” catch of king crab by trawl vessels compared to similar length non-trawl crab vessels. *Id.* One person testified that pollock trawlers had done about as well as the “crab fleet average”. P291 Tr. 7; P355 Tr. 2. He found this surprising since the vessels are mostly operated by trawl fishermen, rather than crab fisherman, stating that this must prove that they were getting an advantage. *Id.*

In committee, the Public Panel Recommendation was a consensus in support of including pot and trawl gear. A consensus was not achieved on the length of the preseason restriction period. Some industry representatives wanted 30 days, some wanted 14 days. RC 135 at 15. Others felt that 30 days was too restrictive and that the change of the red king crab season to October 15 would solve the problem. The Board Committee members supported a 30-day restriction period and inclusion of both pot and trawl gear. Substitute regulatory language was drafted and proposed to the Board. RC 135 at 23. P355 Tr. 7.

C. The Board Properly Considered Applicable Standards of Law During Its Deliberations of the Proposals for Preseason Gear Exclusion

The Board first deliberated on Proposal 291, and using substitute language provided by the committee, amended the department's proposal to include trawl gear in the 30-day preseason gear operation restriction for the Bristol Bay red king crab fishery. The regulation was adopted on a vote of six in favor, zero against, and one absent. The Board later considered Proposal 355 in the context of Tanner crab only, since king crab had been addressed by the adoption of Proposal 291.

1. The Board's Consideration of the Magnuson-Stevens Act National Standards

National Standard 1: The Board addressed the problems of overfishing to achieve optimum yield of the crab stocks. Board member Larry Engel talked about the conservation problems posed by a very short fishing season and people with prior knowledge of the location of crabs, stating that "you could have severe conservation problems" and "very adverse consequences." P355 Tr. 8-9. The gear exclusion period is designed to prevent even the opportunity to prospect. The Board knew that "a trawl is a very effective survey device," noting that the Bering Sea crab survey was performed with a trawl. P291 Tr. 7. Without prior knowledge by fishermen of crab location or abundance, the pace of the fishery can reasonably be expected to be slower than otherwise. The Board's record is clear that a manageable fishery is important to ensure compliance with National Standard 1 to prevent overfishing and achieve optimum yield.

The Board noted that "fair start" purpose of the regulation was an important equity issue, but that there were also important conservation concerns with prospecting. The utilization of pots, trawls or any other gear to determine the location of crab concentrations in the preseason will only shorten the length of the season for a depressed stock fishery that the Board has been trying to lengthen to ensure conservation management. In fact, it would provide opportunities that are certainly contrary to the Board's attempt to rebuild these stocks and inconsistent with National Standard 1

National Standard 2: The Board's record makes it clear that the Board examined all the data that it had before making this decision. The Board's regulations were aimed at "potential" prospecting. The question was not whether prospecting had occurred, but whether the opportunity is there. Given the limitations of observer coverage in the trawl fishery and the capability of trawlers to catch crab with pelagic gear, there is no support for assertions that trawling does not present an opportunity for prospecting

National Standard 3: There is no question but that the Board manages the king and Tanner crab stocks as a unit throughout their ranges.

National Standard 4: The Board's actions were certainly consistent with National Standard 4. There is absolutely no evidence that the regulations discriminate

between residents of different states. Furthermore, a major purpose of the preseason gear exclusion was to provide a fair start to all participating fishermen. The preseason gear exclusion closes the area for 30 days prior to the fishery start date to pot and trawl operation by those fishermen who wish to fish in the directed crab fishery. The goal was to level the playing field. As Board member Dan Coffey reiterated:

Looking first to the national standards, I think the – one of the primary considerations here should be in 4 – or section 4, which deals with fair and equitable to all fishermen. I – I think we all know that the – survey that's conducted on Bering Sea king crab is done with a trawl, a trawl is a very effective survey device, mechanism, method and – and therefore we have that and – and so if someone is permitted to trawl in the area, then what I would be concerned about is going fishing the next day, or the next few days or however long it takes for the data, which they were able to trawl up to become outmoded and they would have an unfair and inequitable advantage over those fishermen who are not permitted to trawl in the period prior to the fishery. If you did that, you would allow an individual, corporation or other entity to – to potentially acquire an excessive share of that fishery which is another thing we're supposed to avoid.

P291 Tr. 7-8.

Under the federal groundfish observer program, vessels less than 125 feet only have 30% groundfish observer coverage, and vessels without observers are known to sometimes behave differently than when observers are on board. P355 Tr. 4. Thus, the Board was concerned that 70% of the time, pollock or flatfish trawl vessels less than 125 feet in length are fishing without observers, which provides an opportunity for undetected prospecting. P355 Tr. 4. Data indicated that October observer coverage is low. The opportunity to prospect for crab with trawl gear by a significant portion of the crossover vessels is very real.

The Board's regulations were intended to remove a potentially unfair and inequitable advantage that trawlers have over other crab vessels that do not have gear on the grounds prior to an opening.

National Standard 5: National Standard 5 addresses conservation and management measures promoting efficiency in the utilization of fishery resources without economic allocation as a sole purpose. There was no evidence that the preseason gear exclusion promotes inefficiency in the utilization of the king crab stocks. There was no evidence that allowing trawlers to fish with the opportunity to prospect would promote efficiency in the utilization of crab stocks except as to their efficiency. The Board does not believe that promoting efficiency among a select portion of a user group could have been Congress' goal. As noted above, the Board had very valid concerns for the fairness and equity in the fair start of the fisheries, and was especially concerned about the potential for overfishing in very short seasons. Moreover, there is no indication in the record that the Board's purpose was economic allocation, at all, much less its sole purpose.

National Standard 6: The Board's actions were consistent with National Standard 6, which deals with taking into account and allowing for variations among, and contingencies in, fisheries, fishery resources, and catches.

National Standard 7: National Standard 7 deals with the minimization of costs and avoiding unnecessary duplication. The Board fully understood the costs and benefits of its regulations

National Standard 8: Further review of National Standards by the Board indicated how a fair start does not provide advantage (prospecting) to one area or community over another, and how this is then fair and equitable to all fishermen.

The Board considered whether or not to include the CDQ vessels in the restriction, noting that the Council had many regulations that exempted CDQ vessels. The Board rejected any exemption for the CDQ fleet, stating that a fair start had to be fair to all.

The Board did, however, on reconsideration of Proposal 355, vote to reduce the pre-season gear exclusion period for *C. opilio* Tanner crab from 30 back down to 14 days, based largely on its concern for full participation in this fishery by CDQ groups. Proposal 355 Reconsideration Transcript at 6-7.

National Standard 9: Board member Dan Coffey commented on the bycatch implications presented by the proposals:

I think that by allowing a fisherman – or the opportunity for this prospecting occurs, we can have a negative effect on the fishery and a negative effect on the resource as well. I think if prospecting occurs, we're going to have a lot of bycatch going on, and I think we're going to have a lot of mortality associated with such bycatch.

P291 Tr. 5; see, also, Board member Umphenour's comments at P291 Tr. At 20. Staff indicated that NMFS observer data of pollock trawl vessels showed a spike of increased king crab bycatch in early October. P291 Tr. 6. In fact, at least since 1993, in years when the red king crab fishery has been open in Area T, the observed bycatch of red king crab has peaked from 4,000 to 7,000 RKC during the October period; an occurrence that doesn't appear in years that the Bristol Bay red crab fishery is closed. *Id.*

National Standard 10: The Board regulations were not inconsistent with the goal of promoting the safety of human life at sea.

2. Consideration of State allocation criteria under AS 16.05.251(e).

Because this proposal has unintended allocation implications, the Board went through its state allocation criteria. Of these state criteria, the Board noted that the availability of alternative fishing opportunities inherently forces fishers to make a fishery participation choice. In fact, in the 1999 opilio fishery, a number of these same vessels chose to forego their A-season Pollock harvest to fish opilio –something they had not done in the past.

3. The Board considered the impact of the regulations on trawl vessels.

Because of the concerns expressed in RC 132, the Board specifically discussed and evaluated each of the concerns laid out by the trawl vessel representative. RC 132 stated that trawlers would lose a portion of their fall groundfish fishery if they chose to go crab fishing. The Board notes that it was only after the 1990 Board action to move the season start date to November 1 that these vessels were able to participate. The pollock fishery consists of an A1, A2, B and C season. These vessels are therefore not excluded from pollock fishing, but must choose whether to participate in the entire pollock B/C season or participate in the Bristol Bay crab fishery. Such choices are common. For example, 16 pollock vessels fished the January 1999 C. opilio season. Five of the vessels first fished pollock and then switched to opilio. But 11 of these vessels forewent their option to fish A-season pollock and chose to fish crab. Further, as the Board understands the discussions under the Council's AFA options, these vessels may form co-ops which could accommodate some seasonal adjustment within co-op fleets (some fish early-some fish late). None of these actions were intended or considered to include or exclude these vessels from participation, only to exclude the opportunity to prospect.

The actions of the Board require that registrants in crab fisheries conform to conservation and management measures necessary to conserve and manage crab stocks. No vessel is excluded, only under certain conditions in a vessel's groundfish endeavors must they elect one fishing opportunity over another. If vessel owners wish to register for BSAI crab fisheries they must prosecute groundfish fisheries in a manner so as to preclude their ability to prospect for crab during the specified fair-start interval. If groundfish fishing occurs outside the crab registration areas, a vessel may still participate in the crab fishery.

There was the statement in RC 132 that prospecting would not occur, mostly because it would use up the prohibited species cap (PSC) limit. However, as the Board understands PSC restrictions, 70% of the fishing time of vessels less than 125 ft. is unobserved for bycatch. Additionally, prospecting for red crab would most likely occur only toward the end of the fall groundfish fishery, and would not tend to shut down the pollock fishery. Data indicated that most of the Bristol Bay red king crab bycatch occurs in the Federal reporting area 509, one of the main commercial crab grounds.

Finally, RC 132 states that the Board does not have legal authority to create a federal fair start that affects the Bering Sea groundfish fisheries. The Board acknowledges that it does not have authority to manage groundfish in federal waters, nor,

by imposing this restriction on the crab fishery, does it intend to. But the Board does have authority to regulate vessels, be they herring vessels, salmon vessels, Dungeness, king, or Tanner crab vessels from anywhere in the state, or groundfish vessels that wish to fish BSAI crab.

The Board's authority to manage crab fisheries in the EEZ arises under the FMP and the Magnuson-Stevens Act and must be consistent and comply with their associated statutory and regulatory requirements to conserve the resource. Compliance with these statutory and regulatory conservation standards does not become unnecessary simply because a conservation measure may have effects on other fisheries, including the groundfish fishery. The groundfish fisheries do not take precedence over the crab fisheries. The Board properly considers such effects on other fisheries, particularly in the context of the National Standards, but concerns about those effects do not trump conservation concerns or other standards the Board must consider. This regulation affects crab fishing vessels and is an extension of other regulations across the state that the Board has adopted or modified to curtail prospecting in state managed crab fisheries. The Board discussed the substantial impacts of their regulations to various users across the state in bringing statewide consistency to regulations.

The following information also supports the Board's decision on this issue. Regarding the imposition of trawl gear restrictions on crab vessels with trawl capacity, Board authority stems from one of the oldest anti-crab prospecting restrictions in our regulations. Regulations 5 AAC 34.625 (c), 5 AAC 34.825(g) and 5AAC 34.925 (j)¹ all restrict vessels engaged in the taking or transporting of king crab from having on board an otter trawl with a head rope or foot rope longer than 60 feet. This regulation was put in place to stop prospecting with trawls during the boom years of king crab fishing. In the boom years, fishermen did not prospect pre-season; instead, under the guise of bait fishing during the season, they used large trawls to prospect for high concentrations of crab to set their pots on. The Board restricted these vessels to a small otter trawl suitable for the harvest of bait, but of minimal value for prospecting. This regulation was in place prior to the imposition of the BSAI king and Tanner Crab FMP, was not challenged as provided for under the original FMP, and thus provided notice of the Board's authority to restrict groundfish gear from prospecting under the FMP.

5. Other Considerations

The Board questioned the department as to whether there was good justification to extend the pre-season restriction from a 14-day to a 30-day period. Crab managers indicated that there was sufficient information to show that red king crab do not move all that much over a two week period. Industry representatives assured the Board that some of the vessels were in fact exploratory crab fishing under the auspices of cod fishing.

¹ 5 AAC 34.925 has been in place since at least October 1974, Register 51. 5 AAC 34.625 has been in effect since July 1979, Register 70. 5 AAC 34.825 took effect in July 1980, Register 74.

The Department of Law indicated that prospecting was a real enforcement problem. Law noted that prospecting is quite common, and that every year they seem to "find" several vessels, which are prospecting. Obviously, there is great advantage to being able to prospect, otherwise fishermen would not risk prosecution year after year.

D. Reconsideration by the Board

Because of industry concerns, the Board reconsidered Proposal 355 later during the meeting. The Board was asked to consider whether the 30-day preseason gear exclusion period should be the same for all fisheries. After much debate, the Board adopted the 30-day period for BSAI crab fisheries with small GHs, and left the opilio fishery with its 14-day period. The opilio fishery has a large GH, the season lasts for two to three months and thus does not elicit the same degree of fair start concern as fisheries that last a matter of days. But mostly, it was industry's operational concerns, and the CDQ groups who may want an early pre-season opilio harvest (but without exemptions from preseason gear restrictions and wanted uniform application) that felt the opilio preseason gear exclusion could be of shorter duration. The motion on reconsideration passed six in favor, zero against, one absent.

2. The Board complied with applicable FMP requirements and criteria.

The Board has treated the measure it took to restrict participation by those who operate gear in the preseason as an FMP Category 3-Other measure. With Category 3-Other measures, the Board is not limited to only the management measures expressly identified in the FMP, though the board must maintain consistency with the FMP goals and guidelines, National Standards and other applicable Federal law, and the Board must consult with the Council on such measure before implementation. To comply with the requirements of the FMP, the Board consulted with the North Pacific Fisheries Management Council at a joint meeting on July 27, 1999. The meeting took place before the regulation was filed or implemented. The regulation had been held in abeyance by the Department of Law at the Board's direction.

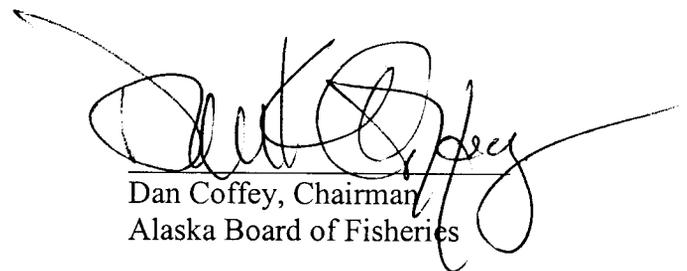
At the joint meeting, the Board listened carefully to comments for the Council and NMFS, explained the reasoning for its action. The Board heard information concerning Council action imposing sideboards on the activities of trawl vessels that cross over and fish the Bristol Bay red king crab fishery, but the Board also heard that those sideboards would not take effect until the 2000 season, at the earliest.

After the joint meeting, the Board scheduled another meeting at which it could vote to continue to keep the regulation on hold or to have it filed and implemented by Law. That meeting took place on August 6, 1999, where the Board voted to lift the hold on the regulation's implementation, but also committed to lift the restriction on trawl gear for the coming season if a federal regulation requires 100% observer coverage during the preseason gear exclusion period, at the suggestion of United Catcher Boats, an

organization largely made up of owners of vessels that participate in the trawl and crab fisheries. The Board also indicated its commitment to review this issue further during its 1999-2000 meeting cycle in coordination and consultation with the NPFMC.

On August 30, 1999, the Board met again and adopted an emergency regulation for the 1999 season to the effect that trawl vessels that had 100% federal observer coverage during the 30-day period prior to the Bristol Bay red king crab season would be allowed to participate in the king crab fishery.

ADOPTED: Oct. 29, 1999
Fairbanks, Alaska



Dan Coffey, Chairman
Alaska Board of Fisheries

VOTE: 6-0-1
one abstention